Human Rights and Businesses

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Human Rights and Businesses

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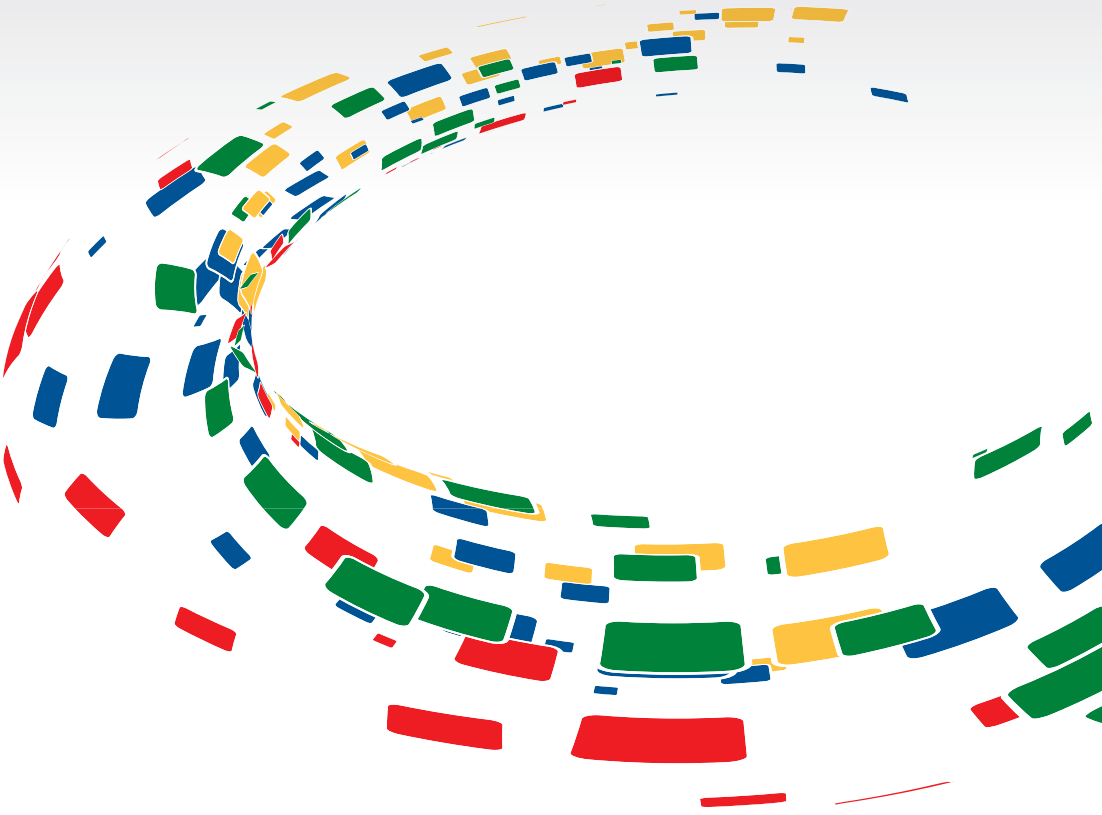

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Human Rights and Businesses

Proceedings of the 14th Informal Asia-Europe Meeting (ASEM) Seminar on Human Rights

Hanoi, Viet Nam

18 – 20 November 2014

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SWEDEN

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The 14th Informal ASEM Seminar on Human Rights held in December 2014 in Hanoi, Viet Nam was timely and relevant. The results reflected in this publication serve to deepen the understanding of the linkage between human rights and business in Asia and Europe. On behalf of the organisers, I would like to acknowledge all those whose efforts made this dialogue possible and fruitful.

First of all, we would like to thank the participants from the ASEM governments and civil society for their substantive and constructive contributions during the Seminar. Their combined knowledge and experience shared in the discussions as well as in this publication shed light on the relationship between human rights and business. Furthermore, the new networks forged over the three-day Seminar will strengthen the connections between the two regions.

We also greatly appreciate the valuable support and advice provided by our partners, the Raoul Wallenberg Institute, the French Ministry of Foreign Affairs and International Development, the Philippine Department of Foreign Affairs and the members of the Seminar's Steering Committee.

We are equally grateful to the Vietnamese Ministry of Foreign Affairs, the host of the 14th Informal ASEM Seminar, particularly the members of the organising team, Mr Pham Hai Anh, Mr Le Thanh Hoai and Mr Dinh Quang Minh.

Our special thanks also go to the Vietnamese Vice Minister of Labour, Invalids and Social Affairs, Mr Nguyen Thanh Hoa, for delivering the welcome address on behalf of the host country, and to Ambassador Jerril G. Santos for giving the opening remarks on behalf of the organisers.

We would like to thank our two prominent keynote speakers as well, Mr Brice Lalonde and Ms Elaine Tan. Their insightful knowledge and perspectives shared at the Opening of the Seminar inspired the frank discussions over the three days.

We are no less thankful to Ms Sumi Dhanarajan and Ms Claire Methven O'Brien for laying the foundation for the Seminar through their extensive background report and compiling the final Seminar Report for this publication. Our gratitude also goes to Ms Shahamin Zaman and Professor Dr Karin Buhmann for their hard work in accurately recording the exchanges within their respective working groups.

The working group discussions would not have been as constructive without the skilful facilitation by the moderators: Ms Delphia Lim, Mr Jermyn Brooks, Mr Jerome Chaplier, and Professor Maria Elena Herrera. We sincerely thank them as well.

We also appreciate the efforts of our seminar volunteers led by Mr Quang Phat Khuat which facilitated the coordination of the event.

Last but not least, I would like to thank my colleagues from ASEF's Political and Economic Department, Mr Thierry Schwarz, Ms Ratna Mathai-Luke and Ms Grace Foo who manage the Seminar's Secretariat. Their hard work ensured the smooth going of the Seminar and the production of this publication.

Ambassador ZHANG Yan
Executive Director
Asia-Europe Foundation (ASEF)

PREFACE: THE INFORMAL ASEM SEMINAR ON HUMAN RIGHTS SERIES

The Asia-Europe Meeting (ASEM)[1] brings together 51 member states (30 European and 21 Asian countries), ASEAN, and the European Union (EU). The ASEM process aims at strengthening interaction and mutual understanding between the two regions and at promoting cooperation leading to sustainable economic and social development. It's an informal process of dialogue and cooperation among partners on all issues of common interest to Asia and Europe.

The biennial ASEM Summit meeting is held alternately in Asia and Europe and is the highest level of decision-making in the process, featuring the Heads of States or Heads of Governments, the President of the European Union, accompanying ministers and other stakeholders. A total of 10 Summit meetings have been held in the cities of Bangkok (1996), London (1998), Seoul (2000), Copenhagen (2002), Hanoi (2004), Helsinki (2006), Beijing (2008), Brussels (2010), Vientiane (2012) and Milan (2014).

At the first meeting of ASEM Foreign Ministers in Singapore in 1997, Sweden and France offered to organise informal seminars on human rights to be held within the ASEM framework. In 2011, the Philippines joined ASEF, Sweden and France as a co-organiser of the Seminar series.

The series employs the following formula:

- A balanced representation between civil society participants from Asia and Europe (invited by the organisers) and official representatives (nominated by the 53 ASEM members) in each Seminar;
- Closed-door debates to allow free and direct exchanges of views; and,
- A set of recommendations, elaborated collectively to be sent to the relevant institutions in ASEM countries as an informal contribution to the official Asia-Europe dialogue.

The experience of the fourteen editions has proven the usefulness of the chosen formula: a climate of confidence and mutual understanding, in accordance with the ASEM spirit, has grown stronger throughout this process.

The 14th Informal ASEM Human Rights seminar on Human Rights and Businesses was attended by 126 participants representing 47 ASEM members, including delegates from international and regional organisations working on business and human rights, national agencies on CSR, development and human rights, national human rights institutions, diplomats, human rights activists and a few representatives from the private sector, to discuss the complexities of business impact and involvement in human rights protection, and to share their own knowledge and experiences on the topic.

Human rights and Businesses: An Overview of This Volume

This volume contains the proceedings of the Seminar. In addition to the official opening speech made on behalf of the host and the organisers, it includes the keynote speeches of Mr. Brice Lalonde (Special Advisor on Sustainable Development to the UN Global Compact), and Ms. Elaine Tan (Executive Director, ASEAN Foundation) who in presenting the Seminar topic, examined the implications of business involvement in human rights.

1 The 53 ASEM Members are Australia, Austria, Bangladesh, Belgium, Brunei Darussalam, Bulgaria, Cambodia, China, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Italy, Japan, Kazakhstan, Korea, the Lao PDR, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mongolia, Myanmar, the Netherlands, New Zealand, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, the Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, the United Kingdom, Viet Nam, the ASEAN Secretariat, and the European Union.

The Background Paper was the primer for the seminar discussions. It was prepared by Ms. Sumi Dhanarajan (Research Associate, Centre for Asian Legal Studies, National University of Singapore) and Dr. Claire Methven O'Brien (Strategic Advisor, Danish Institute for Human Rights).

The Seminar Report, which is based on the working group reports prepared by Sumi, Claire, Ms. Shahamin Zaman and Professor Dr. Karin Buhmann, provides an overview of the key issues discussed at the seminar as well as reflecting details of the working group discussions, providing the key recommendations and challenges raised by the participants. The working groups addressed the following topics:

- State Duty to Protect Human Rights Against Violations by Businesses
- Corporate Responsibility and its Contribution to Human Rights Implementation
- Monitoring, Reporting and Access to Remedies
- Multi-stakeholder Cooperation

10 key messages were identified by the participants, including the consensus that the UN Guiding Principles on Human Rights and Business provide a common framework of globally agreed principles that should be promoted and consistently applied across all ASEM member countries. Some of following recommendations were included in the key messages that were sent to the ASEM governments:

- All ASEM members should implement the UNGPs at the national level and develop National Action Plans (NAPs) on human rights and business which are fully inclusive, participatory and transparent.
- States need to identify appropriate measures to regulate and engage with Multi-National Enterprises (MNEs) and Small and Medium Enterprises (SMEs) to ensure compliance of human rights standards.
- Independence, integrity and impartiality of the judiciary and the judicial system are critical to ensuring access to effective remedy. Transparency and access to information are imperative to ensure victims are fully aware of the facts as well as the processes available to them. It is the State's duty to ensure that this is maintained as part of a strong rule of law.

The volume ends with the concluding remarks from the co-organisers, Ambassador Bengt Johansson (Sweden's Ambassador for Corporate Social Responsibility) and Mr. Frédéric Tiberghien (Technical Coordinator & Representative of the Ministry of Foreign Affairs and International Development of France). In addition to their excellent summing up of the discussions, they also provided several take-away lessons, key among them being the different layers of responsibilities that business, State and civil society bear in their efforts to protect human rights.

Mr. Thierry SCHWARZ
Political and Economic Department
Asia-Europe Foundation (ASEF)

RESPECTING HUMAN RIGHTS: PRACTICAL CONCERNS AND POSITIVE STEPS THAT COMPANIES CAN UNDERTAKE

Brice LALONDE, Special Advisor to the UN Global Compact

(Keynote speech delivered at the opening plenary of the 14th Informal ASEM Seminar on Human Rights)

Ladies and Gentlemen,

Let us begin with what we know – we know that 190 countries are member states of the United Nations (UN); we also know that it is the duty of States to protect and enforce human rights. All the members of the Asia-Europe Meeting (ASEM) are also members of the UN; all of them endorse to the Universal Declaration of Human Rights. We know that all States are responsible to uphold and protect human rights in their countries, to oversee the private sector, and to ensure that businesses are respecting human rights, both at home and abroad. States are responsible for the nexus between business and State, State-owned enterprises and investments, bilateral and multilateral trade agreements, and also for all government agencies that are credited for public procurement, including the privatising of public services. Some countries provide guidance and have national action plans to help business respect human rights.

We also know that, unfortunately, some States do not have the means to enforce human rights legislations (some States perhaps do not make it as much as a priority as much as we do). Over the past 50 years, we have witnessed major corporate scandals affecting human rights such as the 1984 Bhopal gas tragedy, the case of Nike in Indonesia, Shell in Nigeria where people died in their efforts to defend their indigenous rights, the Rana Plaza incident in Bangladesh took place not so long ago.

We know that some big companies benefit on the one hand from the consumer markets of rich countries, and on the other hand, the labour of poorer countries. This is true for some very big industries like mining which has a huge ecological impact, information technology (IT) which has an implication on privacy, and finance which has a huge responsibility with investment and support. Many companies working in these industries realise that they are going to be held more accountable on human rights; I would say that one of the lessons that has emerged from all the scandals is that businesses are now getting more strongly involved in human rights.

The move towards corporate social responsibility led to the creation of the UN Global Compact in 2000. The Global Compact asks companies to respect the 10 UN Global Compact principles; the two first principles are devoted to human rights. Principles one and two require companies to support and respect the protection of internationally proclaimed human rights, and to make sure that they are not complicit in human rights abuse. In addition to the Global Compact, other multi-stakeholder initiatives have also emerged, such as the Extractive Industry Transparency Initiative (EITI), the Ethical Trading Initiative (ETI), the Global Business Initiative on Human Rights (GBI), the Kimberley Transparency Process for Diamonds – multi-stakeholder initiatives on the environment are also important given the important impact that a healthy environment has on the enjoyment of our human rights.

All these efforts have culminated in the UN Guiding Principles on Business and Human Rights. Business must understand, and indeed many are starting to do so, that they are responsible for their actions, that they must meet stakeholder's expectations and that they have reputation to protect. All of this leads towards what is known as a 'social license to operate' which requires business to manage their human rights risks and regulate their behaviour in order to continue their functions.

We know, of course, that companies cannot replace State responsibility on human rights. What is asked of them is that businesses practice social responsibility within their sphere of influence which is the workplace, the marketplace, the supply chain and the community in which they operate.

At the workplace, they are required to ensure that there is no forced labour, no child labour, no discrimination; businesses have to ensure that worker health security, gender quality, the freedom of association, the right to collective bargaining, adequate living wages and working hours are provided. Some of these require a huge amount of detail, for example, employers should provide not only fair wages but also payment receipts, safe working conditions may require safety equipment and appropriate apparel. Remember the Nike scandal in 1997; it was a scandal because women who were not wearing the regulation shoes were forced to run in the sun until they fainted.

In a supply chain, there can be one tier, two tier and even a third tier of suppliers, so companies have to prioritise and analyse, have unannounced or unscheduled checks on suppliers to see what is happening. Suppliers should be asked to join a CSR initiative and seek guidance on complying with requirements. At the marketplace, the misuse of products and incorrect or incomplete labelling is one issue that companies need to tackle - in some countries for instance, products are not labelled correctly in the language of the country.

At the community level as well, businesses must address the impact that their activities can have. There have been cases where some big food manufacturing companies which need a lot of water to produce food have been forced to move away because they were affecting the local water supply. Building infrastructure sometimes displaces people who need to be relocated. Businesses need to ensure that the compensation and relocation provisions that they make are in line with the community's requirements and culture. In lots of countries where there are rampant logging and mining, companies have been asked to invest in education and health facilities in the places where they are situated. In conflict affected areas it is crucial that companies are not feeding into the conflict in any way; special attention needs to be paid to private security companies.

Given all these concerns that need to be factored in what practical steps can we ask companies to take to respect human rights?

First, we know that support of such policies depend on senior management, therefore a human rights policy must come from the top. It must include a policy commitment which should also be a public commitment that is made to build trust. It should trigger in-house learning processes and embed human rights responsibility on all levels of the company. There needs to be due diligence, which means to identify, prevent, mitigate, and account for how a company address its impact on human rights; this in turn requires that there be special attention paid to those who could be more vulnerable such as people with disabilities, indigenous peoples, women, children and people with special needs. Once due diligence is done, the company needs to have some impact assessments on human rights.

All this requires resources. The company must devote funds and be serious about their human rights commitments. The company must consult stakeholders and experts; it must involve all its personnel in different functions – the legal department, the procurement department, the human resources department all have to work together. In the end, it also has to ensure that there is a process that enables litigation. That brings us to what is known as a grievance mechanism which must be legitimate, accessible, committable, equitable, transparent, a source of continuous learning process and also one that is able to adapt to the cultural context of the local community wherever the company operates.

What does 'grievance' mean? I was quite interested in the definition; a grievance can be understood to be a perceived injustice evoking an individual or group's sense of entitlement, which may be based on law, contract, explicit or implicit policies, customary practices, or a general notion of equality and fairness. Similarly, what do 'remedies' mean for companies? It can include apologies, restitution,

rehabilitation, compensation, sanctions, a guarantee of non-repetition; it can be judicial or non-judicial, and sometimes it is better to be non-judicial because of regulation issues. Of course, having a fair grievance mechanism can be difficult so some people suggest that such grievance resolution can be done by the National Human Right Institution (NHRI); in OECD countries it can be the OECD focal point which provides a code of conduct.

I think that the current challenges that companies face is how much such policies cost. Laws such as the United States' Dodd-Frank law prevent companies from using conflict minerals. Many companies would like to comply but because the process can be complicated, rather than address compliance issues, some companies say that they would prefer to leave the country all together. The problem is that while such companies may be contributing to the conflict they are also a source of revenue for those living in that country. There is a contradiction between the fact that one must not feed the conflict and the fact that one must feed the people, so how does a company do that? It is not so easy.

Other dilemmas are those centred on the misuse of products such as the ultrasound machine in India which is a really important product for health issues, however, the technology has been used to detect the sex of an unborn baby and reportedly facilitates the practice of female sex-selective abortions. How should one deal with that? Cisco sold some smart device and it was misused for monitoring and censorship. We have a lot of examples of misuse of products and how difficult it can be for companies to cope with these dilemmas.

We have received a very interesting background paper for this Seminar which contains the idea that solutions to the negative impact of business activities on human rights can be different from top-down as well as bottom-up. We know that to cope with corporate social responsibility we also need a strong civil society, and when we don't have a strong civil society it is more difficult to implement corporate social responsibility properly.

In conclusion, I have been interested to work with multinational and transnational companies and believe they are much better than the regulation that is imposed on them suggests. I think a lot of us still follow the idea that transnational companies are doing very badly vis-à-vis respecting human rights because they have too much power. The fact is, in our world, and on our planet, there is no law that is fully transnational. We have only soft laws slowly making their way in. Transnational corporations are much better than national companies because the former want to stay alive for a long time, they need regulation and they actually ask for a level playing field. They are vulnerable to any negative publicity campaign, especially on the internet which exposes them to criticism much faster and a global level too. So lots of companies now believe they belong as much to their stakeholders as to their shareholders. This is something historical and this is a trend we will see more and more.

Ultimately, I think the alliance between NGOs, transnational companies and I would say, even cities, is the world dynamic today, ensuring much better compliance with human rights.

INTEGRATING HUMAN RIGHTS AND CSR IN ASEAN

Elaine TAN, Executive Director of the ASEAN Foundation
(Keynote speech delivered at the opening plenary of the 14th Informal ASEM Seminar on Human Rights)

Excellencies, Ambassadors, Distinguished Guests and Participants,

It is indeed my great pleasure to attend for the first time the Informal ASEM Seminar on Human Rights. I will be speaking on corporate social responsibility (CSR) and Human Rights in ASEAN, drawing on a baseline study in ASEAN.

Background

On the outset, I would like to state that member states of the Association of Southeast Asian Nations (ASEAN) are moving steadily and inevitably towards economic integration. The core aims for economic integration are: to create a single market and production base, to be a highly competitive economic region, to have equitable economic development, and to integrate into the global economy. The benefits for ordinary people through economic integration are increased employment and new business opportunities. Some countries will reap benefit more than others, but the hope is that all of the economies in ASEAN will develop and benefit from further development.

At the same time, ASEAN is very diverse. Its members are at different levels of social-economic development. There are high-income economies like Brunei and Singapore; middle-income countries such as Indonesia, Malaysia, the Philippines, Thailand and Viet Nam; and lower-income economies, Cambodia, Lao PDR and Myanmar. ASEAN member States also have different political systems and in these countries, there are also a variety of different types of business enterprise (State-led, family owned business, MNCs) and industry sectors.

ASEAN sees itself as a community of opportunities. In wanting to improve its competitive advantage in the business arena and fit into the global economy, businesses in ASEAN have to ensure standards in corporate governance, accountability, transparency and legitimacy. Businesses in ASEAN region face increasingly expectations to show that they are operating in a responsible manner. At the same time, governments in ASEAN are slowly providing guidance to businesses, through national stock exchanges and corporate regulators and national human rights institutions.

ASEAN Community 2015

Overall, ASEAN is making progress in the field of corporate social responsibility (CSR) and human rights. It is committed to human rights and established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. It adopted the ASEAN Human Rights Declaration (AHRD) in November 2012. The Declaration underscored the commitment of ASEAN to ensure that human rights implementation are in accordance to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN member States are party to.

CSR is a strategic objective of the ASEAN Socio-Cultural Community (ASCC) Blueprint. Under the said Blueprint, CSR is instrumental in contributing towards sustainable socio-economic development in ASEAN member states. In moving CSR in ASEAN forward, several steps are being undertaken.

First, ASEAN would like a model public policy on CSR as a reference, to guide the promotion of CSR in the region. In this regard, the ASEAN CSR Network helped to develop a working document that draws from the ISO 26000, a voluntary international standard that provides guidance on social responsibility.

Second, to address the lack of regional cooperation and information on CSR, the ASEAN Foundation catalysed the formation of a regional network for CSR, now the ASEAN CSR Network. The Network was formally registered and incorporated in Singapore in 2011. The Network aims to incorporate CSR into businesses' agendas. It provides information exchanges and functions as a centralised repository of ASEAN knowledge on CSR through case studies and research, within ASEAN.

Third, the ASCC Blueprint recommends that ASEAN encourages the adoption and implementation of international standards on social responsibility. AICHR has completed its baseline study on CSR and human rights in ASEAN. The baseline study on CSR and human rights is part of the Five Years Work Plan of AICHR, which allows the Commission to have a better understanding on the emerging human rights-related issues pertaining to corporate conducts in ASEAN.

Fourth, the ASCC Blueprint recommends that ASEAN increases awareness of ensuring sustainable relations between commercial activities and communities.

ASEAN recognises the close link between CSR and respect for human rights. This is encouraging. There is still a prevalent view with businesses in ASEAN that CSR is irrelevant to them and not a financially worthwhile undertaking. Businesses lack time and know how on how to incorporate CSR in their businesses.

Understanding CSR and Human Rights in ASEAN

The baseline study on CSR and Human Rights in ASEAN commissioned by AICHR revealed the significant divergence in the awareness, understanding and implementation of CSR across the ASEAN member States. The nexus between CSR and human rights in ASEAN is weak. There is lax monitoring of compliance with regard to regulatory requirements. There is an absence of grievance mechanisms. Widespread corruption is an obstacle to effective enforcement and undermines the rule of law in some countries.

The baseline study documented the growth in philanthropy across the region, both in monetary terms, as well as in profile and approach. Business tycoons and regional conglomerates have donated vast sums of money for public services, including education and religious institutions.

However, while philanthropy is a desirable outcome in itself, there is also a risk of companies using philanthropy as a public relations exercise to conceal or whitewash their misdeeds. There is also a risk that companies may be lulled into a false sense that they are adopting sustainable practices because of their philanthropy activities, despite these potentially falling short of international CSR practices.

Efforts are thus needed to modify existing practices, such that they conform to international CSR norms and standards.

Finally, the baseline pointed out that despite the economic advancement across ASEAN, much of the region's population still live below the poverty line. There is a need to balance economic development with responsible business practices. Additionally, the most commonly accepted measure of a country's economic health is the Gross Domestic Product that only includes goods and services. Once again, indicators for measuring economic growth are preferred over contribution of intangibles.

Challenges

There are challenges with regard to CSR and human rights in ASEAN.

Across countries in ASEAN, and within the businesses in each country, there is a large gap in terms of CSR knowledge and practice. Multinational companies and conglomerates are generally in tune

with latest trends, although some small and medium enterprises (SMEs) in ASEAN are providing real examples of business innovations through CSR. Accordingly, there is a strong need to increase general awareness of and education on CSR-related issues. At the same time, targeting information campaign initiative to key sectors and groups — such as ASEAN's low-income economies, SMEs and key industries like agriculture, mining and manufacturing — is required.

An emerging challenge is getting the CSR and sustainability message out. The lack of understanding especially among non-business stakeholders is high. Governments, NGOs and media in general still do not have a correct appreciation for CSR. They still see CSR simply as philanthropy. Governments and NGOs approach companies merely as a source of funding, while media reports primarily on corporate giving and volunteer efforts. Consumer education will also have to increase in order to provide companies with an added incentive to pursue CSR.

There is low awareness of human rights as an element of CSR. Although the State's duty is to uphold and protect the rights of citizens, the responsibility of businesses to respect the rights of individuals is not well understood. Human rights should be made an explicit central element of CSR through -led efforts at increasing awareness and understanding.

The effects of climate change are transforming the way companies look at non-economic considerations, such as recycling and wastage, as well as the use of environmentally harmful raw materials. Large well-established companies are realising that sustainable business models need to include climate change mitigation strategies and that a failure to do so may have an adverse impact on their brand.

Migrant labour abuse is common among the labour-sending countries in the region. The lack of protection of these workers' rights and their access to remedies is an important issue. Business and governments have a key role to play in respecting the rights of these migrant workers and providing an environment in which their rights are protected.

The potential to speed up the empowerment of women can be realised by providing opportunities for more women to move from the informal and agriculture sectors into formal employment. However, the risks of exploitation, neglect of labour standards, and abuse of women's rights are real risks that need to be addressed.

Moving Forward

The ASEAN Community 2015 constitutes a good opportunity to elevate discussions on CSR and role of businesses in achieving ASEAN goals, not only in spurring economic growth but also in social and environmental sustainability. The promotion of CSR has also been identified as key strategy and CSR will continue to emerge as the business response in helping to solve some of the region's pressing concerns.

To move forward, ASEAN needs to promote international norms in the region. The development of CSR practices in ASEAN should be consistently benchmarked against best practices.

More capacity building support is essential to establish the capabilities, knowledge and implementation systems to entrench the practice of CSR in the region. Capacity building support in the form of skills training, workshops and seminars would support the systems required to ensure that all countries in the region can effectively embark on CSR projects and collaborate with relevant stakeholders.

Lastly, ASEAN, as a whole, also needs to improve the documentation of good practices and the sharing of knowledge across countries in the region.

HUMAN RIGHTS AND BUSINESSES: RECOMMENDATIONS TO ASEM MEMBERS

(Seminar report of the 14th Informal ASEM Seminar on Human Rights[1])

Introduction

According to a 2013 report, 40 of the world's 100 largest economic entities were business corporations.[2] Given their economic influence, the impacts of businesses also extend to socio- political issues and, increasingly, their role and accountability in relation to human rights have come under examination. These questions provided the focus for the 14th Informal ASEM Seminar on Human Rights, titled "Human Rights and Businesses" (held on 18–20 November 2014, in Hanoi, Viet Nam).

The 14th Informal ASEM Seminar on Human Rights was organised by the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute (as delegated by the Swedish Ministry for Foreign Affairs), the French Ministry of Foreign Affairs and International Development, and the Philippine Department of Foreign Affairs. It was hosted by the Ministry of Foreign Affairs of Viet Nam and brought together over 125 official government representatives and civil society experts, representing 47 ASEM[3] members to discuss the protection and promotion of human rights in, and by, the business sector. Additional events at the Seminar included side-events on Collective Bargaining and on National Action Plans on Business and Human Rights. In addition, a panel discussion was organised on the role of the private sector in protecting migrant workers' rights.

The Seminar convened four working groups for in-depth discussion on the relationship between businesses and human rights protection. The working groups focused on the State duty to protect human rights against violations by businesses; corporate responsibility and its contribution to human rights implementation; monitoring, reporting and access to remedies; and multi-stakeholder cooperation. These discussions were guided (though not limited) by this initial list of cross-cutting questions as articulated in the concept paper:

1. What are the limits to the responsibilities of corporations under international law and international criminal law? Are there regional differences about the role of businesses in society (e.g., are there different understandings of the concept of corporate citizenship?)

2. At the international level, what can be done to make corporate social responsibility (CSR) and human rights protection a bigger consideration in trade agreements and practices? What is the role of organisations such as the World Trade Organization (WTO) and International Labour Organization (ILO) in this aspect?

3. How can policy coherence on business practice and human rights protection be enhanced at the national and international level? What role and support can regional mechanisms and institutions provide in policy coherence?

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1. The main rapporteurs of this Seminar Report are Sumi Dhanarajan and Claire Methven O'Brien. The report captures the discussions of each of the four working groups as summarised by Working Group Rapporteurs Claire Methven O'Brien (Working Group 1), Shahamin Zaman (Working Group 2), Sumi Dhanarajan (Working Group 3) and Karin Buhmann (Working Group 4). The authors gratefully acknowledge their contributions.
2. See Corporate Clout 2013's "Time for Responsible Capitalism", http://www.globaltrends.com/knowledge-center/features/shapers-and-influencers/190-corporate-clout-2013-time-for-responsible-capitalism
3. ASEM brings together 53 members: Australia, Austria, Bangladesh, Belgium, Brunei Darussalam, Bulgaria, Cambodia, China, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Italy, Japan, Kazakhstan, Korea, the Lao PDR, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mongolia, Myanmar, the Netherlands, New Zealand, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, the United Kingdom, and Viet Nam plus the ASEAN Secretariat and the European Union.

4. Apart from reputational damage, what is the actual risk to companies for poor practice in respect to human rights standards?

5. What are the different approaches required for different industries and business sectors (e.g., extractive industries, textiles, media, service providers, financial institutions, etc.) when it comes to human rights protection (in the context of each of the four working group topics)?

6. What considerations need to be kept in mind for vulnerable groups such as women, LGBT, children and indigenous communities as well as ethnic and religious minorities?

7. Which organisations/institutions have the legitimacy to decide on business standards?

A Background Paper was prepared to provide an informational and analytical premise for the dialogue.

The following key messages emerged from the working group discussions and were shared with ASEM members:

While States remain the main duty bearers of human rights obligations, the private sector has a growing responsibility to ensure the protection and promotion of human rights in all its activities.

There was consensus that the UN Guiding Principles on Human Rights and Business (UNGPs) provide a common framework of globally agreed principles that should be promoted and consistently applied across all ASEM member countries as a means of framing policies and practices at the national and regional levels. All ASEM members should develop National Action Plans (NAPs) to implement the UNGPs effectively.

At the country level, existing legislations that protect human rights should be strengthened and effectively implemented. In order to achieve government policy coherence, business-related human rights should be integrated into the portfolios of all government departments that touch upon the subject. States should put human rights and business on the agenda of international meetings and inter-regional dialogue, including those meetings that take place on trade, exports and investment. Regional mechanisms are required that will document, evaluate and share best practices in human rights and business to strengthen policy coherence across Asia and Europe; such an institution could be set up at the ASEM level.

By failing to protect human rights, businesses can lose their social license to operate, which can have disruptive consequences for their operations. The issue of corporate governance is key for strong compliance measures to be incorporated and some multinational enterprises (MNEs) are increasingly motivated to incorporate human rights into their core business activities. In comparison, small and medium enterprises (SMEs) may lack the financial resources and technical know-how to incorporate human rights concerns into their daily business operations. Governments need to build awareness and sensitise businesses, particularly SMEs, to their human rights responsibilities. Clarity on concepts regarding corporate social responsibility (CSR) and human rights in business will help create a consensus of understanding and assist in the engagement of companies.

Companies should conduct both detailed human rights due diligence and impact assessments in their value chain management. As various industry codes of conduct are already imposed on suppliers there needs to be a coordinated approach for social audits which can enhance the implementation process on business and human rights by companies in their value chain management. States themselves purchase a large variety of products and services through State-led procurement systems, which can be an effective tool to promote and build awareness on corporate responsibility for human rights among companies that do business with State agencies.

Remedy — as defined in the UNGPs — can take on various characteristics and functions, but a focus upon the risks and effects on the victim may be a good frame for articulating an effective remedy.

Victims of business-related human rights abuses face a range of legal and practical barriers in their access to effective remedy and may need support in receiving the requisite knowledge, skills and resources to do so. It is important to extend full protection to human rights defenders working in the area of corporate accountability and human rights and business; awareness-raising amongst national law enforcement and judicial authorities is required in this regard.

States should encourage support to both judicial and non-judicial mechanisms. When non-judicial grievance mechanisms (State-based or otherwise) are engaged, adequate protection to the victims and efforts to ensure fairness in both process and outcome are required and efforts to ensure transparency, such as the effective application of freedom of information legislation, need to be strengthened.

States and international organisations should support and work with multi-stakeholder initiatives (MSIs) to learn what human rights means to business. MSIs can bridge the "language gaps" between policy makers and businesses by emphasising a specific objective or context in which companies operate, through reference to risk management, minimum wages, occupational health and safety. In addition to helping businesses align their activities with the UNGPs, MSIs should develop a roster of good practices with regard to the operationalisation of human rights in business practices.

General recommendations to ASEM members:

1. States should implement the UNGPs at the national level and develop National Action Plans (NAPs) on human rights and business that are fully inclusive, participatory and transparent.

2. States should adhere to their existing international human rights and labour commitments by improving the implementation of national legislation that promote and protect human rights. National reporting on human rights in business should be incorporated into existing processes such as the Universal Periodic Review and other treaty reporting.

3. States need to identify appropriate measures to regulate and engage with multinational enterprises (MNEs) and small and medium enterprises (SMEs) to ensure compliance of human rights standards.

    a) All companies should be required to report on the non-financial impact of their activities both at home and abroad. Human rights impact assessments should be a requirement for all new business developments;
    b) SMEs should be encouraged to participate in the United Nations Global Compact's national networks as these can support businesses in their CSR and human rights commitments.

4. Business responsibilities on human rights protection should be integrated into start-up support and advice provided by public agencies to new companies, especially SMEs.

5. States should consider developing soft incentives (such as preferential treatment in public procurement or in exports support) as a means to encourage businesses to adopt good practices.

6. Human rights impact and diligence are important in supply chain management. Corporate human rights codes for suppliers could be standardised to cover most of the requirements that are applicable to all companies. Simplified compliance requirements will allow for a harmonised base for social audits.

7. When governments act as investors, procure goods or privatise the delivery of public services, they should aim to safeguard human rights by:

a) Following a socially responsible investment approach that encompasses human rights in all State investment policies;
b) Ensuring transparency in the public procurement process as a precondition of monitoring and accountability;
c) Incorporating human rights impact assessment into privatisation processes;
d) Integrating human rights standards into public awarded contracts and service user agreements (for example, through the Availability, Accessibility, Acceptability and Quality or AAAQ criteria).

8. Independence, integrity and impartiality of the judiciary and the judicial system are critical to ensuring access to effective remedy. Transparency and access to information are imperative to ensure victims are fully aware of the facts as well as the processes available to them. It is the State's duty to ensure that this is maintained as part of a strong rule of law. In addition, States should support non-judicial mechanisms, which are an important complement to judicial grievance mechanisms and can have both remedial and preventive functions.

9. Strengthening the capacity of victims as well as civil society groups (i.e., NGOs and trade unions) and other institutions, such as national human rights institutions (NHRIs) that can support them in their pursuit of remedies, is necessary. Free legal aid for victims bringing human rights-related cases is one means of ensuring this.

10. To enable NHRIs to fulfil their Paris Principles mandate on human rights and business, certain measures are needed, such as:

    a) Safeguarding the independence of NHRIs;
    b) Ensuring NHRI mandates are adequate to address and remedy human rights and business–related abuses;
    c) Training and resources to work on human rights and business issues.

11. The UNGPs note that multi-stakeholder initiatives (MSIs) have important contributions to make in the fields of business and human rights. Governments and intergovernmental organisations should work with MSIs to share best practice of the corporate responsibility to respect human rights and assist firms in exercising human rights due diligence. MSIs can help States and intergovernmental organisations reach across the legal and policy limitations of international law, and focus on what human rights means to business.

12. MSIs are not ends in themselves. Their effectiveness is dependent on their internal dynamics and governance, and on their level of transparency and accountability to all stakeholders. In this regard:

    a) MSIs need to engage SMEs also and not just large businesses;
    b) National Action Plans must include the role MSIs can play;
    c) MSIs themselves may need to be aligned with the guiding principles. They may need to have their own grievance and reporting mechanisms.

WORKING GROUP REPORTS

Working Group 1: State Duty to Protect Human Rights Against Violations by Businesses

Pillar I of the United Nations Guiding Principles on Business and Human Rights (UNGPs) addresses States' duty to protect against human rights abuses by third parties, including businesses, within their jurisdiction, and disaggregates this duty into a number of themes, around which discussion was structured in Working Group 1 (WG1).

1. General regulatory and policy functions

1.1 Current status and challenges in Asia and Europe

Guiding Principle 1 (GP1) requires States to protect rights-holders by taking appropriate steps to prevent, investigate, punish and redress business-related human rights abuses through effective policies, legislation, regulations and adjudication, while GP2 refers to States' duty to set out clearly the expectation that business enterprises domiciled in their territory and/or jurisdiction respect human rights. These principles, along with those of corporations' responsibility to respect human rights, and the right to remedy for business-related abuses, attracted strong consensus in the Working Group. It was felt that challenges to human rights from business activities globally, including in both Asia and Europe, were substantial, both in connection with transnational corporations and, on the other hand, SMEs that — while they constitute the majority of corporate entities in most jurisdictions — typically lack resources to make significant investment in establishing sustainable business practices.

Simultaneously, there was agreement amongst participants that, so far, governments had not done enough to address these challenges, with most having yet to react directly to the GPs. An appropriate response, it was agreed, was likely to include both regulatory and "top-down" measures, such as legislation, as well as steps to improve capacity and incentives for businesses to act with respect for human rights — the so-called "smart-mix" previously referred to by the UN Special Representative on Business and Human Rights. Yet, most States were still some way off from achieving this, participants observed, with the need to improve methods and tools for developing policies and legislation, such as regulatory impact assessment, seen as an important stepping stone in this regard. Views varied and no consensus emerged on whether a new UN treaty on business and human rights was needed or would contribute to closing these gaps.

A further obstacle to establishing the right regulatory framework, in both Asia and Europe, was the residual influence of past concepts of CSR, with their emphasis on philanthropy and voluntarism. This, along with other factors leading to State capture, such as corporate lobbying, government reliance on business in general (or on specific corporations) for revenues, personal or party political interests or investments, made it difficult in many contexts to secure support for regulatory approaches, with political will being particularly weak on the human rights impacts of business activities abroad.

Although civil society organisations (CSOs) had already played a role in triggering progress towards new binding standards, consumer and civil society awareness of the human rights dimensions of CSR still remained limited, in both regions. Organised labour was another potentially strong lever with power to influence business behaviour towards respect for human rights, however, trade unions and the full range of labour rights have yet to be accepted in all countries in Asia or Europe. Indeed, trade unionists and labour activists, along with other human rights defenders tackling business-related abuses were subject to increasing attacks, exacerbated in many cases by restrictions on media freedom, transparency and freedom of information. These shortcomings also undermined the role of Environmental Impact Assessment (EIA) which, in many jurisdictions, was not currently functioning

as an effective mechanism of good governance that safeguarded human rights, with participation of affected rights-holders often weak or completely absent. In the area of non-financial reporting, some progress had been made, for example, the new EU Directive, and requirements introduced by Asian stock exchanges were notable advances — but generally, legal requirements were still too weak in this area, with insufficient awareness and consensus around appropriate reporting frameworks.

1.2 Opportunities and recommendations

Notwithstanding such challenges, there were encouraging examples from some States of specific legislative and policy measures taken to promote implementation of the UNGPs, for example, the development and adoption of National Action Plans on business and human rights, and new laws on corporate transparency and reporting, as mentioned. Some States had also developed tools and published dedicated guidance for businesses in specific industry sectors and SMEs on how to respect human rights in practice. Communications technologies were seen as holding great potential to harness and expand consumer power in both Asia and Europe, for instance, through mobile applications that could support consumer purchasing on the basis of certification and labelling schemes. Multi-stakeholder initiatives and labour unions were also valuable resources that could be better integrated into State-based regulatory approaches; this equally applied to business associations, in relation especially to strengthening business capacities in the human rights field. Expanding the scope of existing EIA policies and standards to encompass human rights could also deliver important gains in terms of improved governance and moving closer to human rights-based approaches to development.

WG1 recommended ASEM governments to:

1. Ensure full and effective implementation of all their existing commitments to human rights and labour standards.

2. Ensure the GPs are translated into local languages in all ASEM countries.

3. Put human rights and business on agendas for international meetings and inter-regional dialogues to raise political awareness.

4. Identify appropriate measures to regulate TNCs and step up engagement with TNCs to secure the achievement of human rights standards through supply and value chains.

5. Establish mechanisms to evaluate and share best practices intra-regionally and inter-regionally to economise efforts across States, and to ensure consistent application of the GPs across national contexts and regions, informed by any differences in the background concepts of CSR in Asia and Europe, and with special attention to TNCs.

6. Require companies to report on non-financial impacts, specifically including human rights, and both at home and abroad.

7. Strengthen awareness and actions on the links between the anti-corruption and human rights and business agendas, and ensure transparency, including through freedom of information legislation.

8. Integrate human rights and business into start-up support and advice provided by public agencies, especially to SMEs.

9. Integrate human rights and business issues into regulatory impact assessments.

10. Extend full protection to human rights defenders working in the area of human rights and business and corporate accountability, including through awareness-raising amongst national law enforcement and judicial authorities.

2. The State-business nexus

2.1 Current status and challenges in Asia and Europe

WG1 considered experiences in Asia and Europe relating to the State-business nexus under three headings: government ownership or control of, or support to enterprises; private delivery of public services; and public procurement. There was general consensus on the importance of the role of the State as an economic actor in both regions. In the Asian context, joint ventures, State-owned enterprises (SOEs) and public procurement were issues identified as important in terms of human rights impacts. In Europe, privatisation had diminished the significance of SOEs in some countries, but public procurement remained an issue of high concern. Privatisation and contracting typically had left gaps in human rights accountability in its wake, given that human rights remedies remained State-focused, and not applicable to private companies delivering public services on behalf of the State, whereas human right issues might not lie within the scope of administrative accountability mechanisms. Across both regions, the State's role as investor or supporter of investment was also highlighted, for instance, through public pension funds, sovereign wealth funds, export credit agencies and development banks. Likewise, the tendency towards liberalisation of essential public services through trade and investment agreements, such as the Transatlantic Trade and Investment Partnership (TTIP) in Europe, was of universal concern.

Today's legal frameworks internationally, regionally and nationally were observed to be inadequate in this area, and had not yet been aligned by duty-bearers with the GPs. For example, the requirements on public purchasers to accept the lowest bid, and interpretations of the Most-Economically Advantageous Tender (MEAT) by courts and bodies issuing procurement policies and guidance, are often in direct contradiction with the State's duty to protect human rights in its commercial transactions. Such rules had historically prevented public authorities from considering production processes and their social and environmental externalities in making procurement decisions and needed urgently to be revisited. International standards, such as the International Finance Corporate (IFC) Performance Requirements, Organisation for Economic Co-operation and Development (OECD) Common Approaches on export credits and World Bank Safeguards, were often used as benchmarks or proxies by public purchasers, where they did attempt to assess business partners' respect for human rights — yet these standards themselves were not yet fully consistent with the GPs. It was acknowledged, however, that the goals of effective monitoring of public supply chains, and the establishment of adequate accountability mechanisms and remedies for those affected, were challenging, particularly given the current lack of know-how and learning networks amongst public authorities in this area.

In aggregate, the discussion highlighted these issues as posing a potential threat to States' commitments to and delivery on the new Sustainable Development Goals, with the expansion of private delivery of public services noted in particular as a possible challenge to accountability in this context.

2.2 Opportunities and recommendations

Aspects of the status quo were however identified as possible platforms for stronger and more effective State action in to protect human rights in connection with the State-business nexus.

For instance, the European Court of Human Rights (ECHR) and its jurisprudence already clearly articulate that the positive obligations of public bodies to protect human rights from third parties — and the right to a remedy — extend to the domain of privatised public services. There were encouraging examples from some countries where the executive was intensifying its requirements on SOEs to report on non-financial impacts, including human rights, and to take action on the basis of impacts or risks identified. Some countries had undertaken extensive analysis to establish how contract terms for private delivery of health and social care should be defined in order to safeguard human rights of

service users. Measures to integrate due diligence and respect for human rights into the investment policies and practices of pension funds could draw on the experiences of the private sector, even if they did not need to be limited to the latter's scope or approach. Citizen-users of services and utilities could be valuably mobilised to monitor respect for human rights in their delivery, if provided with the right information and resources.

On this basis, WG1 recommended that ASEM governments:

1. Integrate human rights and business standards into the public procurement process, and also ensure transparency in public procurement as a precondition of effective monitoring and accountability.

2. Safeguard human rights where public services are delivered privately, including by:
   a) incorporating human rights impact assessment into privatisation processes;
   b) integrating human rights into framework terms and service contracts;
   c) integrating human rights into service user agreements, for instance with reference to the AAAQ criteria.

3. Concerning public pension funds, and elsewhere the State acts as an investor:
   a) introduce adequate disclosure and non-financial reporting requirements;
   b) adopt a socially responsible investment (SRI) approach that encompasses human rights;
   c) consider establishing grievance mechanisms by which policies and practices of public investment vehicles can be held to account by rights-holders.

3. Policy coherence

3.1 Current status and challenges in Asia and Europe

It was widely felt that the GPs were correct in identifying policy coherence — or rather, the lack of it — as a problem in connection with business and human rights. Strong tensions existed, in many countries, between the desire to attract and retain investment, and the perceived need to compromise human rights protections to secure the former goal. Horizontal incoherence, i.e., the pursuit of conflicting policies and objectives by different arms of the executive, was seen as a universal challenge. This might be owed to a range of factors, for example, political rivalries or turf wars between ministries; the typical division of labour within governments that situates human rights often within justice or foreign affairs ministries, and the general lack of exposure of business, trade or economic ministries to human rights issues; and the need for business-related ministries or agencies to be seen as the "friend of business" and the perception of regulation as a burden on corporations.

Concerning trade, while liberalisation might yield positive results for human rights, for instance, in terms of a boost to employment in sectors where protective measures are eliminated through new trade agreements, there were also typically negative impacts for sectors newly exposed to competition, which could hurt employment and livelihoods, while standards and accountability with regard to public services subject to liberalisation could also suffer, as discussed above. Risks in this area were currently aggravated by the lack of accepted practical methods for conducting human rights impact assessments of trade agreements.

Similarly, in some cases investment agreements had been witnessed as restricting the scope of the State to protect human rights, while international arbitration was not itself accountable to human rights standards, nor a mechanism by which States could be held accountable to their human rights obligations. Most States had not attempted yet to integrate the GPs into export and investment promotion activities, such as trade and commercial missions, or advice provided to prospective exporters.

3.2 Opportunities and recommendations

There was thus ample room to strengthen horizontal coherence, within individual States, and vertical coherence, between States' human rights obligations and the policies and agreements they conclude at international level. Both could be addressed by National Action Plans on business and human rights, which were strongly welcomed and urged as an opportunity to anchor the GPs firmly in national law, policy, practice and institutions; with NAPs processes presenting an excellent opportunity to align information and views, and gradually build trust, across stakeholder groups.

Concerning vertical coherence, participants felt much remained to be done in Asia: while the ASEAN Intergovernmental Commission on Human Rights (AICHR) had undertaken some relevant and positive work, the greater number of regional and sub-regional entities, and their differing human rights mandates, complicated the picture. This was true also for federal States, with a key question being what central governments of federal States had done, or needed to do, to inform State-level legislatures, executive bodies, and agencies about the GPs.

National human rights institutions were identified as having a positive role to play in promoting coherence, through fulfilment of their mandates to monitor and promote respect for human rights. NHRIs, in conjunction, for instance, with other experts, legal practitioners and CSOs, could valuably contribute research and advice for necessary revisions to law, policy and practice. While NHRIs had taken steps to increase their engagement with the business agenda, including through the ICC Working Group on Business and Human Rights, challenges remained, including the lack of government responsiveness to NHRI recommendations, the need for stronger modalities for cross-border cooperation between NHRIs of home- and host- States, and the failure of some States in both Asia and Europe to establish Paris Principles-compliant NHRIs.

WG1 recommended that ASEM governments:

1. Undertake to develop NAPs on human rights and business and follow fully inclusive, participatory and transparent NAPs processes — for instance, providing financial support to enable civil society participation where needed, especially for groups at risk of vulnerability and marginalisation, and through timely information sharing.
2. Provide for exchanges of experiences around NAPs and national implementation of the UNGPs, for example, through EU-ASEAN, and other inter-regional dialogues; dialogues with and between sub-regions; side-events; peer reviews based on NAPs; and East and South Asian Regional Forums on human rights and business.
3. Integrate human rights and business into existing human rights processes such as the Universal Periodic Review and treaty reporting.
4. On trade and investment:
    a) identify appropriate standards and methods for performing human rights impact assessments (HRIA) of trade and investment agreements, and implement these;
    b) Ensure that such HRIA are followed up, with a participatory approach to monitoring impacts of trade and invest agreements involving labour and civil society representatives.
5. On Special Economic Zones, learn from past experiences, and ensure that human rights standards are not curtailed, for instance, with reference, to land, labour and environmental rights.
6. Recognise that taxation regimes, especially measures in one jurisdiction permitting corporations to evade or avoid taxes in others, can be a human rights and business issue, and respond accordingly.
7. Take steps to permit NHRIs to fulfil their Paris Principles mandates on human rights and business, including:
    a) Safeguarding the independence of NHRIs;
    b) Ensuring NHRI mandates are adequate to address and remedy business-related abuses;
    c) Providing support for adequate training and resources to work on business issues.

Working Group 2: Corporate Responsibility and its Contribution to Human Rights Implementation

Working Group 2 (WG2) participants, across all stakeholder categories, were in accord in their support for the UN framework and its second pillar, the corporate responsibility to respect human rights. Pillar II defines business respect for human rights as acting with due diligence to avoid infringing human rights and addressing any negative impacts on rights resulting from corporate activities. In order to mitigate adverse impacts that harm communities or individuals, businesses need to adhere to national and international rules and regulations.

Currently, however, most companies interpreted their human rights obligations through their own pre-established agendas, especially in developing countries where there is weak implementation of national laws and regulations, while international laws lack direct applicability to non-State entities. Even if under international law there may not be legal implications for businesses that do not respect human rights, in reality businesses that fail to respect human rights may create negative reputations for their customer base. They may also lose their social license to operate. Businesses operating in host countries where legal frameworks and standards differ from those in their home countries may find it challenging to understand which standards to follow.

It was therefore desirable that all national laws and regulations uphold respect for human rights, such as in the area of fair wages for workers, other workplace conditions and transparency. This was true even while the influence of global legal and policy frameworks on the national level was acknowledged. Governments should implement a legal framework including measures to eliminate human rights abuses, and create tools and mechanisms towards due diligence by businesses. Participants felt that CSR initiatives and best practices should be shared, and that dissemination of lessons learned from some European States in particular would be valuable, for example, in relation to soft law approaches. It was observed that many businesses in developing nations consider companies in the developed world to be role models with regard to CSR.

Overall, it was felt that the role of the government in supporting the implementation of human rights in, and by, businesses was crucial and could not be ignored. Many countries in the global North were engaging in the development of National Action Plans to identify strategic actions on issues, for example, pertaining to labour, environment, operating standards, and non-discrimination. Such processes could furthermore identify business sectors posing the greatest risks to the rights of people and communities. Businesses had a role to play in highlighting to governments the need to promote CSR, such as through dissemination of best practices. It was imperative to embed human rights in CSR dialogue and discussions at local and global levels, and to promote the engagement and involvement of relevant national, regional and international institutions in the understanding and implementation of business human rights obligations.

Many multinational enterprises had adopted CSR policies, and most had sufficient financial and human resources to implement human rights due diligence procedures and encourage human rights compliance in their own and their business partners' activities. However, SMEs accounted for the large majority of companies numerically, and they frequently lacked the financial resources and know–how needed to incorporate respect for human rights into their daily business operations. Wherever relevant national legal standards did not themselves guarantee the necessary minimum of rights to the individual, SMEs inevitably lagged behind in upholding business responsibilities. It was agreed amongst participants that the State's duty to sensitise and build awareness of human rights required both a top-down effort, with steps at the inter-governmental level, and bottom-up measures to promote education, knowledge and better business behaviour. Finally, greater commitment was required from businesses to fulfil their human rights obligations in relation to their supply and value chains, even if monitoring could be challenging. This is especially critical in the informal sector, where a potentially vast number of small businesses operate to insufficient or no standards at all.

1. Europe

The EU had made a number of policy commitments in support of the GPs, such as the European Union's 2012 Strategic Framework on Human Rights and Democracy. Before 2011, the European Commission's policy on CSR described corporate responsibility as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis". With its 2011 Communication on CSR, the Commission, however, adopted a new definition of CSR as "the responsibility of enterprises for their impacts on society", removing the suggestion of voluntariness. Over recent years, more European multinational companies had begun to report on CSR, representing an indirect acknowledgment of such responsibility: reporting on corporate responsibility had increased to about 5,800 reports in 2010, compared to less than 50 in the early 1990s.

Individually, some advanced economies had put policies in place to address business responsibility to respect human rights. As a result of an EU-level commitment, member States had pledged to produce National Action Plans (NAPs) on business and human rights, a State-driven initiative to engage multiple stakeholders in addressing the challenges of business and human rights. Some European countries had already initiated or were working towards such plans. Processes for NAPs had great potential to encourage, inspire and provide incentives to other countries to do the same; they could further provide a basis for exchanging human rights' practices and defining and supporting implementation of regional-level measures. NAP processes need to involve businesses in consultations and design, and NAPs that are finally adopted should be widely disseminated amongst the business community. A NAP could sensitise businesses to the need to engage with human rights by communicating about risk mitigation measures and clarifying the "business case" for respecting human rights, alongside the legal and ethical case for human rights alignment.

Corporate non-financial reporting provided an opportunity for companies to prove they had undertaken human rights due diligence processes. Significant numbers of large businesses in the global North already published sustainability reports relying on frameworks such as the Global Reporting Initiative (GRI), which was seen as an important first step towards transparency and accountability. Yet even businesses reporting on the basis of such frameworks needed to ensure that reporting processes were inclusive and adequately involved stakeholders. Reporting and other transparency and disclosure measures had potential to reveal businesses' positive impacts, for instance, by highlighting good practices through case studies. States could improve non-financial reporting by providing supporting guidance: some countries in Europe, for instance, had developed formal guidelines to help companies identify human rights risks.

WG2 noted the inter-dependence of Pillars I and II of the UN Framework, particularly in the area of public procurement, which are effective tools to promote adoption and implementation of due diligence. States purchase an enormous volume and large variety of products and services, and procurement systems could build awareness of CSR and contribute importantly to implementation of the responsibility to respect human rights among companies, which do business with State agencies. Where the procurement system permits the deployment of purchasing by public authorities to promote green and social objectives, relevant rules and procedures should be expanded in scope to human rights.

2. Asia

Although disparate laws and regulations addressing CSR exist in most developing countries, within Asia, Southeast Asian nations were seen still to take the lead. CSR had been included in the ASEAN 2009 Socio-Cultural Community Blueprint with an objective to promote the involvement of the private sector in its development strategy. It was also addressed by recent work of the ASEAN Intergovernmental Commission on Human Rights (AICHR).

Civil society, government and business all had a role to play in strengthening awareness of business and human rights issues, however, Asian businesses, it was felt, were yet to address risks and abuses. A large proportion of businesses in Asia, as in Europe, are SMEs, which, as noted earlier, may be often constrained by scarcity of financial and human resources. To complicate matters, definitions of SME varied between the Asian and European contexts. The role of large businesses in securing respect for human rights through supply chain management was important, and here a business-to-business approach could be beneficial to promote incorporation of CSR and human rights initiatives and policies amongst SMEs. Businesses at the top of supply chains should require their suppliers to sign on to codes of conduct before purchases of products or services were made. Participation in the UN Global Compact (UNGC) and UNGC Local Networks could also help businesses in working towards respect for human rights and meeting purchasers' CSR requirements. Internal and external social audits could be valuable in monitoring and demonstrating impacts on implementation of relevant standards.

In terms of the government's role, corruption in the public and private sectors was acknowledged as a continuing problem, where it could lead to weak enforcement of laws and standards. Governments need to work with civil society organisations and business to eradicate corruption as far as possible. Overall, there was a need for strong regulatory framework and effective enforcement to avoid business-related human rights abuses, including in supply chains. This should permit governments to highlight and reward human rights and CSR best practices, for example, through tax incentives and other soft law instruments.

As regards civil society, collaboration between CSOs and business was viewed as essential to address communication gaps and create transparency. If the need for community engagement was ignored, businesses risked adverse impacts on communities, which could easily escalate. It was accordingly important to involve all rights-holders as well as other stakeholders in human rights due diligence and impact assessments. While philanthropy could not be used to offset abuses, businesses could in some circumstances valuably contribute to education, health and livelihood restoration processes. Another issue identified by WG2 as significant for developing Asian countries was that of the difference between a minimum wage and a living wage. Government needed to ensure mechanisms were in place to monitor the evolving cost of meeting basic needs and to ensure minimum wage levels changed appropriately in response. Generally, illiteracy and poor access to education hindered understanding of human rights, so that bottom-up capacity building initiatives were needed to enhance understanding of global standards and human rights, especially for groups at risk to vulnerability, marginalisation and discrimination, to empower them to address denials of human rights and to demand the social services to which they were entitled.

Overall, greater efforts were needed to raise awareness amongst all stakeholders which could in turn stimulate commitments from businesses to build their capacity on human rights issues, including at the level of boards and senior management. In developing nations, greater clarity concerning definitions of CSR that adequately reflect human rights and the UN framework and GPs would help create consensus and help to bring SMEs along on this journey.

3. Opportunities and recommendations

There was overall consensus that the State played a crucial role in supporting the implementation of human rights practices by business. Human rights need to be embedded in CSR dialogue at the local and international levels in which the full participation of the relevant national, regional and international institutions is required. Furthermore, businesses needed to demonstrate greater commitment to fulfilling their human rights obligations, especially in their supply and value chains, particularly in the informal sector where a vast number of small businesses are operating to insufficient or no standards at all.

1. Governments should implement a legal framework including measures to eliminate human rights abuses, and create tools and mechanisms towards due diligence by businesses. All national laws and regulations should uphold human rights and ensure transparency in practice, such as in the area of fair wages and workplace conditions.

2. NAP processes need to involve businesses in consultations and design. NAPs that are finally adopted should be widely disseminated amongst the business community.

3. Non-financial reporting and other transparency and disclosure measures have potential to reveal businesses' human rights' impacts. States could improve non-financial reporting by providing supporting guidelines to help companies identify human rights risks.

4. State procurement systems can be used to build awareness of CSR and procurement requirements should include human rights requirements for companies that do business with State agencies.

5. Governments need to ensure mechanisms are in place to monitor the evolving costs of meeting basic needs and to ensure the difference between a minimum wage and a living wage are addressed.

6. SMEs would benefit from greater clarity at the domestic level about the definitions of CSR, which should adequately reflect human rights and the UN framework and GPs. A business-to-business approach could be beneficial to promote incorporation of CSR and human rights initiatives and policies amongst SMEs.

Working Group 3: Monitoring, Reporting and Access to Remedies

Working Group 3 (WG3) considered the issue of access to remedy with regard to business-related human rights abuses. It was widely agreed that access to effective remedy was one of the more neglected issues with regard to business and human rights. It was the issue where there had been least progress albeit that its neglect has had profound negative impact. This was acknowledged by the UN Working Group, the Council of Europe and a number of States in their national action plans on business and human rights, as well as civil society actors and academics.

Victims of business-related human rights abuses face numerous practical barriers that can significantly hamper their access to effective remedy. These include prohibitive costs, lengthy processes, and the inability to understand or engage with the legal system as well as the more insidious obstacles presented by social exclusion. Women and young adults often are excluded from participating in grievance mechanisms.

There are many available laws as well as access to remedy mechanisms, but the political will to implement these effectively and to the benefit of rights-holders is generally weak. This is perhaps one of the greatest impediments to protection and remedy for rights-holders affected by abusive corporate activities.

A particularly acute challenge is victims' lack of information and knowledge with regard to what rights they hold, how to seek protection, and how to access remedial mechanisms when their rights have been abused. Overcoming this particular challenge is critical to achieving access to effective remedy and it is important to explore various strategies including the role of legislation, for example, the right to information laws.

Victims of business-related human rights abuses who use grievance mechanisms — whether judicial or non-judicial, State or non-State based — are often the disadvantaged party when they are up against more powerful and better resourced corporations or where the State and corporation have been complicit in perpetrating the abuse. Addressing this power imbalance remains a persistent challenge. Further, raising a grievance can put communities at real risk of retaliation. Whistle-blowers

and human rights defenders are equally at risk and recent events have demonstrated the physical danger these present.

Independence, integrity and impartiality of the judiciary and the judicial system are critical to ensuring access to effective remedy. It is the State's duty to ensure that this is maintained as part of a strong rule of law. Where this is compromised, affected individuals or communities lose faith in judicial mechanisms and are thus less inclined to pursue them. This can then lead to an even further weakening of the judicial system's capabilities in addressing business-related human rights abuses. Non-judicial mechanisms are an important complement to judicial mechanisms. They can provide speedy and inexpensive recourse as well as fulfil a preventive function ("early warning system"). They are promoted by the UNGPs for this reason. It is important, however, to consider the suitability of engaging non-judicial remedial mechanisms according to the kind of human rights abuses that have taken place. A further issue is how remedies are defined and who defines them in the course of these processes.

Follow-up on judgments, findings or agreements at the end of a grievance process — whether judicial or non-judicial, State or non-State based — can be poor. Judgments often go unenforced and mediation outcomes, unfulfilled.

Corruption is a key — and cross-cutting — barrier to access to remedy. The links between corruption and human rights remain underexplored, hampering efforts to develop effective measures to address the problem.

Finally, international law could be a useful tool for framing State duties and obligations regarding human rights. Engaging it to flesh out accountability of non-State actors for human rights violations is important. The question remains whether there is a need for an international, legally binding instrument in this regard.

WG3 identified and focused its discussions upon the following seven areas:

1. Practical barriers to accessing remedy: Awareness raising and capacity building

It is important to give primacy to victims' agency when considering how best to address the barriers that they face, including strategies to empower and build capacities and capabilities to engage effectively with grievance mechanisms. Ensuring that victims have the information and skills to navigate the mechanisms, to organise effectively and to enlist adequate support from other actors is crucial.

Communities also need to know what their rights and entitlements are, and what remedial measures are available, and how to use them. In order to address broader issues concerning the vulnerability of victims, it is important to think in terms of changing mind-sets not just of the affected communities, but of all stakeholders in the process. The idea of capacity-building workshops for different stakeholders — NGOs, media, government, companies — was explored. The aim of such workshops would be to achieve a shared understanding of the issues. For communities, some issues that require raising awareness include understanding (i) the project-cycle; (ii) the purpose of and the data within social and environmental impact assessments; (iii) the various business actors involved. Additionally, it is important to help manage expectations as to what is achievable with regard to remedy. Who should fund capacity building on access to remedy was a moot point. Whereas, in some ways, businesses should contribute, there is a need to maintain independence and guard against undue influence. The group also discussed awareness-raising workshops for companies and the media, noting the media's important role in helping to place pressure on companies to respond appropriately to grievances. Bottom-up processes for rights-holders to defend their rights or seek remedy are particularly desirable in situations where bureaucratic and procedural barriers may prevent effective use of mechanisms.

2. Judicial mechanisms

Without a strong rule of law it is difficult to build effective remedy mechanisms. Where judicial mechanisms fail to deliver effective remedy, this can often be traced to fragmented or corrupt judiciaries and judicial systems. Judicial independence could be encouraged and supported through regional and international networks of judges. Such networks could also support judges in sharing experiences, expertise and jurisprudential approaches towards addressing human rights liabilities of non-state actors. As an example, the use of the writ of amparo by the judiciary in the Philippines, could be used in other jurisdictions as a way of providing speedy, injunctive relief to victims that are under imminent threat of human rights abuses.

3. Non-judicial mechanisms

Business-related human rights abuses necessitate a multi-pronged approach and as such, non-judicial mechanisms play an important role in ensuring access to remedy. The State should be engaged in supporting such mechanisms, particularly with regard to State-based non-judicial mechanisms, such as national human rights institutions (NHRIs) and the OECD national contact points (NCPs). How effective (or impartial) these institutions are, however, varies from country to country. Where the NCP function is shared between the relevant government departments and is interdisciplinary, there is generally greater effectiveness. With regard to NHRIs, whilst some have made good efforts to address business-related human rights complaints, others continue to be unfamiliar and ill-equipped to address these kinds of abuses. One persistent problem is that State-based non-judicial mechanisms often do not have enforcement powers. As an example, the French NCP engages in sound inquiries but only has the power to issue a communiqué stating that it has solved the dispute. No details are provided and as such, its findings may have little deterrent effect.

Whilst the idea of an ombudsman function received much attention, there were different views on whether it is feasible to achieve at an international level. Certainly, at a national level, it was viewed as an idea worth pursuing given its potential advantages in terms of speed, independence, and expertise.

There was a tendency to dichotomise access to remedy discussions into judicial and non-judicial mechanisms, but the two were seen by the WG3 as inherently linked. At least at the national level, a strong rule of law is often as imperative to achieving access to remedy via non-judicial mechanisms, as it is to judicial mechanisms. Without the threat of successful legal action as a viable alternative, companies are not incentivised to engage or take the process seriously, nor are victims assured of proper enforcement of outcomes; in other words, non-judicial mechanisms are compromised in a "justice-free" zone.

One means of bolstering the remedial effects of non-judicial mechanisms is by engaging a range of mechanisms when addressing an incident of abuse and to tie together different processes for greater impact. This has the advantage not only of widening the potential for gaining a remedy but also in enabling a degree of cross-fertilisation between the different remedial mechanisms both in normative as well as process terms.

4. Mediation as a non-judicial mechanism

Mediation, as a type of non-judicial mechanism, is increasingly utilised to address business-related human rights disputes. It can be appropriate particularly where resolution of the dispute is premised upon building relationships between the parties. Often, in cases of human rights abuses, there continues to be a relationship between the company and the victims after the conclusion of the dispute. Mediation, however, always involves compromise and, for this reason, it needs to be conducted in good faith and with a high degree of trust. Mediation is not suitable for all types of human

rights violations. In cases of serious or gross human rights abuses, there must be recourse to the courts. The question of how to balance frank and open negotiations against the need to ensure public accountability when designing and implementing a mediation process was highlighted as demanding further attention. The skills of mediators and the relatively small pool with expertise in handling sensitive cases of business-related human rights abuses was here an important consideration, and considering how to build that skill base — especially at the local level — should be a priority.

5. Definition of remedy

How remedy is defined in the course of both judicial and non-judicial mechanisms is attracting debate. As defined in the UNGPs, remedy can take on various characteristics as well as functions. Remedy can be about financial compensation, but it should also help to establish truth. It may also seek to secure a commitment from the perpetrator not to repeat the abusive behaviour. In keeping with prioritising protection of rights-holders, it was suggested that a shift towards the idea of restorative justice, with its focus upon the effects on the victim rather than upon the act, may be a good frame for articulating an effective remedy. The nexus between remedy and justice was also discussed, especially in the context of financial compensation. Where non-judicial grievance mechanisms are engaged, there is sometimes a risk that the injury suffered by the victim is no longer defined as a human rights violation, especially when the negotiation focuses upon compensation. In these circumstances, the ideal of justice being done may be compromised.

6. Engaging international law

Engaging international law in addressing access to remedy is important, but how to do so effectively remains a question. Utilising existing international human rights law mechanisms, such as the Universal Periodic Review and the Special Procedures of the UN Human Rights Council, offer possibilities. The working group discussed the possibility of a treaty — as has been considered in a recent UN Human Rights Council resolution. There were concerns about the practicalities of bringing a convention to fruition. Nevertheless, WG3 felt it was important to engage with the current discussions and process in an open-minded and constructive way. States should be pressed to translate international human rights standards into national law. Doing so would boost protection with regard to business-related human rights abuses, including access to remedy.

7. Extraterritorial jurisdiction

The transnational nature of many business-related human rights abuses present particular obstacles for victims seeking remedy. Extraterritorial jurisdiction can provide greater access to remedy in some circumstances. For example, the liabilities of the subsidiaries of transnational companies (TNCs) may be better secured through extraterritorial proceedings, and victims may be better ensured of impartial judicial proceedings. Further, there may be benefits where the perpetrator's liabilities in extraterritorial cases are judged against international human rights standards. The prospects of engaging extraterritorial jurisdiction are however unrealistic for many victims given the costs involved and other practical barriers to taking a case outside of their own country, though support through civil society organisations working in partnership across countries can assist in this context.

8. Conclusions and recommendations

1. Access to remedy for business-related human rights abuses has received far less attention and resources than is commensurate with the problem. This needs to be urgently addressed. One way to do this is to support the documenting and sharing of good practices through political forums, professional networks and judicial networks. As part of its mandate, the UN Working Group is well placed to play this role. Further, the Working Group would encourage ASEM to support relevant institutions to facilitate such sharing between the two regions. For example, in ASEAN, the ASEAN Intergovernmental Commission on Human Rights (AICHR) could be supported in taking on this role.

2. When considering the mechanisms for addressing access to remedy for business-related human rights abuses, protection of rights-holders and remedies suitable to the victims must be the ultimate goals.

3. Ensuring victims of human rights abuses can engage with or participate in grievance mechanisms in ways that support access to effective remedy requires them to have the requisite knowledge and skills. Supporting awareness-raising activities and putting in place right-to-information-type legislation are useful and important first steps. It is also important to ensure governments and business actors are equipped with the requisite knowledge to enable them to establish and engage in rights-compatible grievance mechanisms to achieve rights-compatible remedies.

4. Strengthening the capacity of victims to achieve access to effective remedy is critical. Free legal aid for victims bringing human rights-related cases is one means of ensuring this. Further, growing the capacity of civil society groups and institutions, such as National Human Rights Institutions that provide victims support in their pursuit of remedies, is necessary.

5. Non-judicial mechanisms are an imperative and States should encourage and support them. Both their remedial and their preventive function should be recognised and developed. It is important however that rights-holders are accorded adequate protection within these mechanisms and that they are fair both in process and outcome. Whether or not non-judicial mechanisms are used should be evaluated according the circumstances of the case. Implementation of outcomes is an important aspect of accessing effective remedy, though often lacking.

6. Many countries across Europe and Asia have legislation that can promote and protect human rights. Stronger efforts should be made however to implement or where necessary, to strengthen, such laws so that they are more human rights- compatible.

7. The UNGPs should be actively promoted as a means of framing and influencing policies and practices at the national level with regard to access to effective remedy, as well as monitoring and reporting of business-related human rights abuses.

8. There should be a mandatory requirement for Human Rights Impact Assessments for all new business projects. The concept of “free, prior and informed consent” should be integrated into all national development and investment projects.

9. Corruption often poses a considerable barrier to achieving access to effective remedy. The relationship between corruption and human rights should be better explored so as to enable an understanding of how it directly and indirectly enables human rights abuses to take place, and how it can block recourse to remedy.

Working Group 4: Multi-Stakeholder Cooperation

Working Group 4 (WG4) focused on collaboration through multi-stakeholder initiatives (MSIs) and their particular contributions to promoting and achieving the corporate responsibility to respect human rights. Precisely due to their multi-stakeholder composition and collaboration, MSIs have important contributions to make to the field of business and human rights and the implementation of the UNGPs. States and international organisations may support and work with MSIs to reach across the legal and policy limitations of international law and focus on proactive learning on what human rights means to business.

MSIs apply various modes of governance that broadly involve collaboration between private and/or public organisations. Key stakeholders and players in MSIs include individual businesses, business associations, multinational firms, SMEs, governments and intergovernmental organisations, civil society organisations, investors, buyers and private consumers and development partners. Collaboration through MSIs may take diverse forms and multiple stakeholder composition does not necessarily imply multiple sectors or actors: an MSI can be within a single firm or organisation. The working group drew attention to the UN Global Compact, ISO26000, GRI, International Code of Conduct for Private Security Providers, the Voluntary Principles on Security and Human Rights, Thailand's Liveable and Happiness Cities, the Swedish Development Agency's (SIDA's) collaboration with the Cambodian garment sector and the ILO's "Better Factories Cambodia", China's CSC9000T for the textile sector, the Vietnamese government's promotion of dialogue between employers and workers, and the ICMM (the International Council of Mining and Metals) as examples. The Working Group observed great variance between countries in terms of engagement with MSIs. This may be influenced by differing income levels among consumers, which may affect their expectations of firms and their ability to apply and economically enforce these expectations through their buying decisions or patterns.

1. Strengths and weaknesses of MSIs for business and human rights

Governance gaps are a key factor permitting business-related human rights abuses and MSIs may act to address these. While they are not "necessarily the best way to govern",[4] they can address critical issues of knowledge transfer and awareness raising, capacity building and monitoring. They may also offer remedies or act as channels to business- or State-based remedies, including National Contact Points under OECD's Guidelines on Multinational Enterprises.

In particular, MSIs have the capacity to "translate" human rights standards — formulated in legal terms and originally addressing States — into norms that refer to business activities. Given their experience in terms of stakeholder outreach and operationalising human rights for business practices, MSIs also offer insights to States and intergovernmental organisations with regard to their efforts to improve business respect for human rights. MSIs may also collaborate with other stakeholders in providing teaching on human rights responsibilities for business, whether to firms, government officials, NGOs/CSOs or educational institutions.

Importantly, MSIs are not limited by the territorial and jurisdictional borders of States. Further, whilst MSIs' norms may lack legal enforceability per se, their Codes of Conduct (CoCs) and similar standardised requirements may be incorporated in the terms and conditions of business contracts between parties. MSIs may also affect a firm's reputation and decisions of investors, buyers and consumers.

Amongst weaknesses of MSIs, however, were felt to be that their norms and decisions are not directly legally enforceable, and that they lack of uniformity and are sometimes insufficiently clear

4. See Background Paper, section 9.5.

on standards and expectations. Moreover, certification, a widely relied on governance modality for MSIs, is not always a meaningful way of targeting human rights risks. Where there are a large number of MSIs functioning in a similar sector or field, firms may select less strict or less pertinent alternatives. The UN Global Compact's sanctions regime was discussed as a relevant example. This delists companies that do not provide their Communications of Progress for two consecutive years. The Working Group saw both strengths and weaknesses in this approach: the strength being that the firm is expected to account for and report on its implementation of the ten UNGC principles; the weakness in that firms with little experience in the field of business and human rights, or CSR in general, may risk being de-listed before they even start to grasp and work with the complexities of participation, or decide against becoming active in the first place.

2. Human rights-focused MSIs

MSIs explicitly or implicitly work around a range of human rights issues, amongst which the Working Group highlighted labour rights, human rights and security (including private security providers), food security and consumers' rights, land rights, host communities, vulnerable groups (including indigenous groups and migrant workers), supply chain management, and investors (including international financial institutions).

Labour rights are a key focus issue of many MSIs. Working hours, rest and leisure, salary and remuneration, occupational health and safety (OHS), child labour and forced labour, freedom of association and collective bargaining and discrimination on prohibited grounds remain problems in many states and sectors — including construction and agricultural, and sectors whose products enter global value chains, such as electronics, garment and food in both Asia and Europe. MSIs may provide awareness-raising and capacity building for firms as well as communities and workers, for example, with reference to the rights of migrant workers and of union members. MSIs may also contribute to strengthening public governance, for instance, by supporting labour inspectorates, as observed in one Asian example. MSIs may collate and share best practices across sectors and countries, with examples in relation to sourcing and fair trade practices. MSIs may also provide capacity building for unions to strengthen awareness of labour standards in accordance with ILO conventions and UN human rights instruments.

Investors can hugely influence firms by imposing requirements on those firms they decide to invest in. MSIs deriving from financial institutions such as the Equator Principles and the UN Global Compact Principles for Responsible Investment were noted as important developments.

3. Designing and implementing MSIs

Inclusion, participation and consultation of stakeholders are important in effecting human rights due diligence since these elements enable firms to accurately identify, avoid, mitigate and/or remedy adverse human rights impacts. Rights-holders and other stakeholders may have expertise on the issue or sector in question. Drawing upon such expertise and knowledge in order to identify relevant human rights risks and processes provides "process legitimacy" that can ensure the legitimacy and effectiveness of MSIs. Measures may be needed to facilitate stakeholder participation, for instance, providing translations in the languages of local communities.

Whilst issues of process and inclusion are important in the development of MSIs, learning and appreciation of what exactly human rights risk means, in terms of practical business activity, becomes a priority in the implementation phase. MSIs, by providing normative content, can enable dialogue that sensitises a firm to human rights concerns and links these to the implications for the firm and its activities that may then contribute changing practices.

Civil society plays many different roles across diverse MSIs, ranging from initiators to watchdogs. It is important that the role of CSOs is clear in the specific context. CSOs do, however, sometimes fear losing their integrity when working with MSIs and it is important to ensure modalities to address this, both for CSOs as well as for other participants.

MSIs may have a particular role in assisting SMEs. Given their size, SMEs often face particular challenges in devising and carrying out processes to manage their human rights impact. MSIs may help to address the costs and other resources necessary for SMEs to respect human rights when they supply to larger firms.

4. Effectiveness of MSIs

MSIs should draw on people in businesses who have knowledge of human rights and how to bring them into business practice. For companies in particular, the impact that an MSI has on the human rights issue at stake in the context of the business operation and the locality are key. While one participant noted the appeal of the UN Global Compact as a result of being based on global standards such as the Universal Declaration on Human Rights and ILO core labour standards, others observed that in some contexts, specific national or sector MSIs may add greater value.

Corporate participants recommended addressing human rights issues in ways that will make the firm's officers see the need and benefits of complying with human rights standards. For example, corporate buyers can talk to suppliers about risk management, minimum wages, occupational health and safety. When involving corporations in MSIs, it is important to realise the positive contributions that they can make to human rights. National Global Compact Networks can play a major role in terms of disseminating best practices in this regard. MSIs need to consider carefully who best to engage within firms. It was noted that CSR departments are not always the right target group, since they may sometimes lack the requisite human rights knowledge. However, these departments are created in recognition of the corporate need for stakeholder engagement and responsible business practices. Thus, it is advisable to further emphasise and encourage the acquisition of specialised human rights expertise within the existing CSR functions.

The large range of MSIs and an emergence of new MSIs could lead to an undermining of human rights focus. This should be given attention, as human rights, even in the context of the business, have a specific set of norms that go beyond ethics and the voluntary approach often associated with CSR. "MSI fatigue" is also a risk — and States, firms and other stakeholders have an important role in limiting this by striving towards consistency, comprehensiveness and relevance of current and future MSIs.

Modalities to provide a measure of accountability are important for trust and confidence in MSIs. Transparency is key, as is the legitimacy derived from demonstrated commitment from those involved. Reference to the UNGPs as a normative based can also aid legitimacy, as has been the case in the Code of Conduct for Private Security Providers, the UNGC and ISO26000. Legitimacy and trust also presuppose engagement with relevant stakeholders and a process to ensure that the interests of actual or potential human rights victims are represented in a way that ensures attention to competing or non-aligned interests among such groups.

5. Human rights due diligence

Human rights due diligence forms a core principle of the UNGPs. One corporate participant observed that due diligence is a well-known corporate governance concept at least in large firms, and thus an entry point for explicating human rights. It was however critiqued for its lack of clarity. Conventional understandings of due diligence envisage a static process by ending at the point where a certain decision is made, whereas human rights due diligence is, critically, an open-ended process. Thus, exactly how human rights due diligence is operationalised by a firm is a key question. MSIs may make important contributions by developing human rights due diligence guidelines in this regard.

6. Conclusions and recommendations

1. In working with MSIs to support the corporate respect for human rights, their specific context and objectives should be kept in mind. This may be global or specific to the issue, sector, socio-cultural or political context, country, supply chain; and/or related to monitoring, certification, learning and stakeholder involvement and consultation. The emphasis should be on the concept or interest that creates the difference for human rights. Companies will often understand this from the perspective of impact on their core business. For example, human rights may be made meaningful to businesses through reference to risk management, minimum wages, occupational health and safety, and knowing about and respecting the regulations in the area as an element in the preservation of the social licence to operate.

2. A distinction must be made between the development of MSIs and their implementation. In both cases, the focus should be on how they assist firms in respecting human rights. This may mean different key stakeholders at the different stages. For the development of MSIs, process and inclusion is very important. For implementation, learning and appreciation of what exactly human rights at risk means in terms of practical business activity is important. MSIs may open a dialogue on the implications for the firm and how its activities can contribute changing practices to ensure respect for human rights.

3. For legitimacy, trust, effectiveness and efficiency, MSIs should consider bottom-up approaches, transparency and the incorporating the normative basis of human rights. The UNGPs are one of the most novel and globally agreed guidance instruments for business on human rights. Several other MSIs such as the UN Global Compact, ISO26000 and others make references to the UNGPs, which facilitate a common basis and human rights coherence across MSIs.

4. As part of their State duty to protect, governments should encourage firms to engage in MSIs. At the same time they should pay attention to potential weaknesses and pitfalls of MSIs. Governments and intergovernmental organisations should work with MSIs to share best practice of the corporate responsibility to respect human rights and assist firms in exercising human rights due diligence.

5. Finally, there is a need for modalities to ensure that members of MSIs — especially civil society organisations — retain their integrity while contributing their expertise to the MSI. States and intergovernmental organisations should consider how to support these.

HUMAN RIGHTS AND BUSINESSES: EMERGENCE AND DEVELOPMENT OF THE FIELD IN ASIA, EUROPE AND GLOBALLY

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(Background paper prepared for the 14th Informal ASEM Seminar on Human Rights)

SECTION I. INTRODUCTION AND CONTEXT

1. Introduction

The purpose of this Background Paper is to give an overview of the topic of human rights and business and to provide some common foundations for discussion by participants during the 14th Informal ASEM[1] Seminar on Human Rights.

Section 1 reflects on the evolution of the business and human rights field. Propelled by community mobilisation and networked social activism during the 1990s and 2000s, a proliferation of transnational corporate accountability norms, standards and initiatives led ultimately to the endorsement of the UN Guiding Principles on Business and Human Rights in 2011. Section 1 then recalls some of the central principles and concepts of international human rights law most relevant to area of business and human rights.

Section 2 relates developments with regard to business and human rights in the European and Asian regions respectively, including steps taken to implement the UN Guiding Principles specifically.

Section 3 addresses the four working group themes:

1. State duty to protect against human rights abuses by businesses
2. Corporate responsibility and its contribution to human rights implementation
3. Monitoring, reporting and access to remedies
4. Multi-stakeholder cooperation

The paper concludes by highlighting some emerging issues that may influence the business and human agenda in the future.

In this paper, broad references to Asia refer to the Asian ASEM Member States of Bangladesh, China, India, Japan, Korea, Mongolia, Pakistan; the ASEAN Member States of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam, and also the ASEM Member States of Australia and New Zealand and Russia.

Europe refers to the European ASEM Member States of the 28 European Union Member States of Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Norway and Switzerland are also ASEM members[2].

1. The Asia-Europe Meeting (ASEM) is an intergovernmental forum for dialogue and cooperation which fosters political dialogue, reinforces economic cooperation, and promotes cooperation in other areas.
2. At the time of writing, Croatia and Kazakhstan were not yet ASEM members. Croatia and Kazakhstan acceded to ASEM at the 10th ASEM Summit (16–17 October 2014).

2. The evolution of the business and human rights agenda

The social and environmental implications of commercial activity have been a constant feature of our political economy. From abhorrence of the transnational trade in slaves, to the harsh working conditions associated with the Industrial Revolution, incidences of human rights abuses from earlier era have played a role in shaping today's business and human rights discourse. Likewise, responses to such abuses, such as the birth of the trade union movement, recognition of fundamental workers' rights, and the establishment of the International Labour Organisation (ILO) at the end of World War I, manifestly influenced the contemporary scene. The Universal Declaration of Human Rights in 1948 heralded the first global expression of human rights to which "all organs of society" bore responsibility for its respect. At that moment some of history's worst business-related human rights abuses were also revealed, with companies both facilitating and benefiting from the horrors of war.[3]

The post-War era witnessed decolonisation and corresponding calls for economic self-determination by newly independent States marked, for instance, by the establishment of the UN Conference on Trade and Development and Group of 77 developing countries.[4] Amongst this group, the power of transnational business was perceived as a threat and, in 1972, the UN General Assembly was warned by them of "... a coming conflict between multinational corporations ['MNCs'] and democratic governments."[5] A UN Commission and Centre on Transnational Corporations (TNCs) was duly established with one of its tasks to devise a TNC Code of Conduct.[6] This project was highly controversial: capital-exporting States sought a non-binding instrument to secure protections for MNCs in host States, whilst conversely, developing countries pursued a set of binding rules to allow them to regulate TNC activities and social impacts, including on human rights.[7] After ten years, negotiations were suspended and the UN bodies focused on TNCs dismantled.

During this period, however, other international organisations did manage to conclude soft standards addressing TNC activities. The OECD Guidelines for Multi-National Enterprises (MNEs) were established in 1976 and addressed issues such as employment relations, environment, science and technology, competition and consumer protection.[8] The ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, promulgated in 1977, stated that all parties should respect the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the Constitution of the ILO and its principles, according to which, freedom of expression and association are essential to sustained progress.[9] The 1970s and 1980s saw the first steps towards socially responsible investment, with the Sullivan Principles and MacBride

3. See, for example, Edwin Black, *IBM and the Holocaust: The Strategic Alliance between Nazi Germany and America's Most Powerful Corporation* (Dialog Press, 2001). See further discussion of the *IG Farben* case below.
4. Peter T. Muchlinski, Multinational Enterprises and the Law (Oxford: Blackwell Publishing, 1999).
5. This was given by Salvador Allende, President of Chile, in part reacting to allegations that ITT, the American telecoms company, was conspiring with the CIA to overthrow his government. He continued, "We are faced by a direct confrontation between the large transnational corporations and the states. The corporations are interfering in the fundamental political, economic and military decisions of the states. The corporations are global organisations that do not depend on any state and whose activities are not controlled by, nor are they accountable to any parliament or any other institution representative of the collective interest. In short, all the world political structure is being undermined." (Salvador Allende, Speech to the UNGA, 4 December 1972).
6. See "UNCTC Origins", United Nations Centre on Transnational Corporations, http://unctc.unctad.org/aspx/UNCTCOrigins.aspx. This followed a 1973 study by UN-appointed Group of Eminent Persons on the impact of multinational corporations on the development process and on international relations.
7. Claire Methven O'Brien, "Human Rights and Transnational Corporations: For a Multi-Level Governance Approach", PHD Thesis, European University Institute (2009). The UN "Draft Code on Transnational Corporations" can be found in United Nations Center on Transnational Corporations, Transnational Corporations, Services and the Uruguay Round (New York: United Nations Publications, 1990), Annex IV, p. 231. See also Surya Deva and David Bilchitz, Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Cambridge: Cambridge University Press, 2013).
8. "OECD Guidelines for Multinational Enterprises", http://mneguidelines.oecd.org/.
9. International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (17 November 2000).

Principles brought forth to address companies' conduct in apartheid South Africa and Northern Ireland, respectively.[10]

Alongside continuing economic liberalisation, a steady rise in the number and size of TNCs continued in the 1980s and 1990s. Relaxation of trade, investment and capital controls brought about a gradual shift from locally-integrated to globalised supply chains and, to some extent, downwards pressure on protective regulations. Manufacturing sites could now be readily relocated according to labour costs and tax advantages, weakening the bargaining power of organised labour and triggering, amongst other things, Special Economic Zones designed to attract foreign direct investments.

Yet globalisation brought other changes. Wider access to the means of receiving and distributing information through new communications technologies and networks opened the way to transnational activism and coordinated global campaigns by NGOs and trade unions. Early targets of such actions were consumer-facing brands such as from the garment sector and abusive working conditions prevailing amongst their suppliers were brought to public attention.[11] Another focus was the extractive industry. The 1990s saw a series of allegations that security forces had committed gross human rights abuses against communities while acting on behalf of oil companies.

A tragic, stark example is seen in the hanging of Ken Saro-Wiwa and eight other activists who had campaigned against environmental damage resulting from Shell's operations in the Niger Delta. This sparked widespread outrage around the world and crystallised public concerns about corporate impunity.[12] So did the Bhopal disaster of 1984, in which an estimated 24,000 died and more than half a million were injured as a result of a gas leak at a pesticide plant belonging to Union Carbide India Limited (UCIL)[13]. A 1989 settlement with the Indian Government for US$470 million secured an average of a mere US$400 per victim.[14] From an ethical viewpoint, international human rights standards such as the UDHR and subsequent international and regional human rights instruments ought to have provided the natural frame for those seeking redress for corporate human rights abuses. Yet legal as well as political obstacles stood in the way of using human rights instruments and courts to challenge corporate wrongs. Top amongst these, at the time, was the limited scope to apply human rights obligations to non-State actors and in the "private sphere".[15] Another was the transnational character of the companies usually in question, which often obscured both the locus of responsibility within firms. Although the State duty bearer could be held accountable in those circumstances, Home States denied all responsibility for their companies' activities abroad; host States, equally, were unwilling or unable to challenge the conduct of TNCs as vehicles of much-needed foreign direct investment.

Business itself actively resisted any expansion of the scope of the social "licence to operate" to encompass human rights through the 1990s. Popular concern and frustration at the apparent governance "vacuum" attaching to globalisation prompted world-wide mobilisation against institutions perceived as its vehicles, such as the World Bank and the World Trade Organisation, climaxing in the 1999 "Battle of Seattle"[16].

10. Christopher McCrudden, "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?", Oxford Journal of Legal Studies 19, no. 2 (1999), 167. Though less well-known, two further codes, both concerned principally with forced labour, focused respectively on the then Soviet Union and China: the Slepak Principles and the Miller Principles. See Jorge F. Perez-Lopez, "Promoting International Respect for Worker Rights through Business Codes of Conduct", Fordham International Law Journal 17 (1993), 9.
11. See, for example, Jeffery Ballinger, "The New Free Trade Heel. Nike's Profits Jump on the Backs of Asian Workers', Harper's Magazine, August 1992.
12. Other high-profile cases presenting in this period included those relating to operations connected to BP and Occidental Petroleum in Colombia, ExxonMobil in Indonesia and Total in Myanmar.
13. The US-based Union Carbide Corporation (UCC) was the majority owner of UCIL, with Indian Government-controlled banks and the Indian public holding a 49.1 per cent stake.
14. See further Peter Muchlinski, "The Bhopal Case: Controlling ultra-hazardous industrial activities undertaken by foreign investors", Modern Law Review 50 (1987), 545.
15. Andrew Clapham, Human Rights in the Private Sphere (Oxford: Oxford University Press, 1996).
16. On November 30, 1999, anti-globalisation protests surrounding the WTO Ministerial Conference in Seattle saw an unprecedented protest crowd of at least 40,000.

Yet into this vacuum had already crept the beginnings of an alternative approach to the social regulation of transnationally-integrated markets. With early supply chain campaigns directed at consumer-facing brands hitting their mark, companies under pressure to respond — often with cajoling or support from civil society organisations (CSOs) — had begun to develop "voluntary" human rights codes of conduct. Soon, a number of multi-stakeholder initiatives emerged based often upon voluntary codes. Perhaps the highpoint of this trend, in 1999 the UN established its own "Global Compact", comprising initially nine principles for companies drawn from the UDHR, ILO Core Labour Standards and other international conventions relating to the environment, with a tenth on anti-corruption added later.

In terms of Corporate Social Responsibility (CSR), this represented the beginning of the integration of human rights into the social component of the "triple-bottom line" concept, to be identified, measured, audited, verified, reported and assessed as a risk, along with financial and environmental factors.[17] Nevertheless, during the 1990s and early 2000s intense debate continued over the virtues and value, or otherwise, of corporate "voluntarism" as an approach to addressing companies' human rights impacts[18], and what room there might be under existing international law to hold States and companies accountable for the latter's defaults.[19]

Within the UN, these issues were taken up for a second time in 1998, when a Working Group on the Working Methods and Activities of Transnational Corporations was established by the then Sub-Commission on the Promotion and Protection of Human Rights. By 2003, this Working Group had drafted its set of "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights". According to these "Draft Norms", while the State had a primary duty to protect, respect and promote human rights, within their respective spheres of activity and influence, companies were also identified as human rights duty-bearers.[20] Though greeted warmly by most NGOs, the draft norms were criticised by business associations and some trade unions and finally rejected by States in the then Commission on Human Rights as having "no legal standing".[21]

With reported corporate involvement in abuses still increasing however,[22] the UN Human Rights Commission invited the UN Secretary-General to appoint a Special Representative (SRSG) on the issue of human rights and transnational corporations and other business enterprises in 2005. Assuming this role, Professor John Ruggie was requested inter alia: to identify and clarify standards of corporate responsibility and accountability for human rights; to elaborate on the role of States in effectively regulating and adjudicating business enterprises; and to clarify the implications of business enterprises for concepts such as "complicity" and "spheres of influence".[23]

17. John Elkington, *Cannibals with Forks: Triple bottom line of the 21st century business* (Oxford: Capstone Publishing Ltd, 1999).
18. According to Stephens, the "economic incentives [remained] insufficient to trigger voluntary compliance with international human rights standards". See Beth Stephens, "Amorality of Profit: Transnational Corporations and Human Rights", Berkeley Journal of International Law 20 (2002), 45.
19. International Council on Human Rights Policy, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (Geneva: International Council on Human Rights Policy, 2002).
20. United Nations Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, (13 August 2003). The "Draft Norms" provided a detailed enumeration of human rights and how they applied to companies, and provided for their implementation via internal adoption, assessment, monitoring, verification and compensation.
21. Commission on Human Rights, Agenda Item 16, E/CN.4/2004/L.73/Rev.1 (16 April 2004), para. (c). Exceptionally amongst the business community, the Business Leaders Initiative on Human Rights that made commitments to "road test" the Draft Norms. See "Business Leaders Initiative on Human Rights (BLIHR)", Business & Human Rights Resource Centre, http://business-humanrights.org/company-policysteps/other/business-leaders-initiative-on-human-rights-blihr.
22. The Business and Human Rights Resource Centre contributed significantly to dissemination of reports of business involvement in human rights abuses from its launch by Chris Avery in 2002: "Who and Where We Are", Business & Human Rights Resource Centre, http://business-humanrights.org/en/about-us/who-and-where-we-are.
23. Commission on Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2005/L/87 (15 April 2005).

2.1 The UN Guiding Principles on business and human rights

The SRSG sought to apply an approach of "principled pragmatism" to his mandate, with the aim of devising a framework that would "reduce corporate-related human rights harms to the maximum extent possible in the shortest possible period of time"[24]. From the outset, he rejected the Draft Norms, criticising what he suggested were their "exaggerated legal claims and doctrinal excesses".[25] Accepting that human rights laws did not place direct obligations on companies, the SRSG accordingly emphasised the status of human rights norms as much as an ethical and moral framework as one of legal responsibilities. Cautioning against an international treaty, he argued that negotiating such an instrument would take years, and could result in a lowest common denominator outcome.[26]

In 2008, at the end of his first three-year mandate, the SRSG outlined a "three-pillar" framework as a conceptual architecture for understanding the respective roles and responsibilities of government and business for human rights: Pillar 1 is the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; Pillar 2 is corporate responsibility to respect human rights, meaning that companies are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved; and Pillar 3 is access to remedy, which requires both States and businesses to ensure greater access by victims of business-related human rights abuses to effective judicial and non-judicial remedies.[27]

Unanimously welcoming his report, the UN Human Rights Council (UNHRC) granted the SRSG a second mandate to "operationalise" the UN Protect, Respect and Remedy Framework, and to provide guidance on steps that States, businesses and others should take to implement it. In 2011, at the end of this second term, the UNHRC, again unanimously, endorsed its principal product, the UN Guiding Principles on Business and Human Rights (hereafter referred to as the GPs),[28] whose contents are discussed at length in the sections relating to Working Groups I–III below.

2.2 Implementation and ongoing challenges

At the same time as it endorsed the GPs, the UNHRC established a new Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG)[29], and mandated it to promote the dissemination and implementation of the GPs; promote good practices and lessons learned on GPs implementation; support capacity-building and the use of the GPs; undertake country visits;[30] make recommendations at national, regional and international levels for enhancing access to effective remedies for those whose human rights are affected by corporate activities; and develop dialogue with governments and other actors, such as the UN Global Compact, ILO, World Bank, International Finance Corporation (IFC) and UNDP, as well as TNCs and other business enterprises, national human rights institutions (NHRIs), representatives of indigenous peoples, civil society organisations and regional and sub-regional international organisations. The UNWG is also requested to integrate a gender perspective into all its work.

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24. John Gerard Ruggie, Just Business: Multinational Corporations and Human Rights (New York: W. W. Norton & Company, 2013)
25. The SRSG attributed the Draft Norms' failure to win support to, amongst other things, their assignation to companies of duties ranging over matters that had not yet been accepted by states such as the "principle of free, prior and informed consent". Ibid.
26. Ibid.
27. John Gerard Ruggie, Report of the Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc A/HRC/8/5, 7 April 2008, http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf
28. John Gerard Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework, Annex, UN Doc. A/HRC/17/31, 21 March 2011, http://business-humanrights.org/en/un-guiding-principles/text-of-the-un-guiding-principles.
29. Human Rights Council, Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4 (16 June 2011), http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement.
30. To date, the UNWG has conducted visits to Mongolia, United States of America, Ghana and Azerbaijan: "Country visits of the Working Group on the issue of human rights and transnational corporations and other business enterprises", United Nations Office of the High Commissioner for Human Rights, http://www.ohchr.org/EN/Issues/Business/Pages/WGCountryVisits.aspx.

The UNHRC further provided for an annual, global Forum on Business and Human Rights to discuss trends and challenges and promote dialogue and cooperation with participation from all stakeholders.[31] Additionally, the UNWG has held regional forums in Latin America[32] and Africa, with plans for others.[33] Renewing the mandate of the UNWG in 2014, the UNHRC expressed its support in particular for the development of guidance in the areas of national action plans (NAPs) on business and human rights, and study of possible developments in the areas of domestic law remedies to address corporate involvement in gross human rights abuses, including with regard to a possible international instrument on legal remedy.[34]

In parallel, other UN human rights bodies[35] and international organisations[36] have aligned their own frameworks and standards to the GPs. Many governments, business associations, individual corporations, NGOs, labour organisations and NHRIs have likewise responded to the GPs to varying degrees, and numerous initiatives of this kind are discussed in later sections.

As a significant marker in the contemporary evolution of norms and standards on the responsibility and accountability of corporate actors for their social, environmental and human rights impacts, the GPs set down a framework that — consistent with the conventional restrictions imposed by international human rights law — maintains the primary responsibility of States to protect against human rights violations. At the same time, they give explicit recognition to the responsibility of businesses to respect, and not harm, human rights. Arguably, they thus contribute to preserving the legitimacy of human rights through a re-orientation of human rights norms, if not laws, in line with a changed global environment, and at a time when this is essential to ensuring their relevance as a narrative responsive to people's lived experiences of indignity and injustice.

Notwithstanding, doubts persist about the regulatory effectiveness of the GPs' voluntary approach. In 2014, only 272 out of 80,000 or so transnational firms have a human rights policy. While the GPs rhetoric may have captured the policy-making "peaks", uptake on the ground seems slow, prompting claims that "firms are still not ready to be safe rather than sorry".[37] It may be the case that only law can bind,[38] but questions remain as to whether a legal approach would yield any better results, in terms of increased awareness, implementation and enforcement. A hard law, punitive approach has long had its own sceptics, particularly where corporations are the objects of rules,[39] with numerous empirical studies disclosing the significance of social factors, both internal and external to regulated companies.[40]

31. "United Nations Forum on Business and Human Rights", *United Nations Office of the High Commissioner for Human Rights*, http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx.
32. "2013 Regional Forum on Business and Human Rights for Latin America and the Caribbean", United Nations Office of the High Commissioner for Human Rights, http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013LACRegionalForumBusinessandHumanRights.aspx.
33. "African Regional Forum on Business and Human Rights, 16–18 September 2014, Addis Ababa (Ethiopia)", United Nations Office of the High Commissioner for Human Rights http://www.ohchr.org/EN/Issues/Business/Forum/Pages/AfricaRegionalForum.aspx.
34. Human Rights Council, "Human rights and transnational corporations and other business enterprises", A/HRC/26/L.1 (23 June 2014), http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/062/40/PDF/G1406240.pdf?OpenElement.
35. See, for example, Committee on Economic, Social and Cultural Rights, Statement on the obligations of states parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1 (12 July 2011), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2011%2f1&Lang=en; and United Nations Convention on the Rights of the Child, General Comment No. 16 regarding the impact of the business sector on children's rights, CRC/C/GC/16 (17 April 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en.
36. The 2011 revision of the OECD Guidelines for MNEs included a new chapter on human rights intended to align with the GPs; likewise the ISO26000 social standard.
37. Susan Ariel Aaronson and Ian Higham, "'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms", Human Rights Quarterly 35:2 (2013), 333.
38. Bilchitz contrasts the GPs' "moral normativity" with "binding normativity", which in his view is needed to achieve corporate accountability for human rights abuses and which he argues only law can provide: David Bilchitz, "A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles", in Surya Deva and David Bilchitz (eds.), Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect (Cambridge: Cambridge University Press, 2013), 107-137.
39. See, for example, Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford: Oxford University Press, 1992), Julia Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-regulatory' World", Current Legal Problems 54 (2001), 103.
40. See, for example, Neil Gunningham et al., Shades of Green: Business, Regulation and Environment (Stanford: Stanford University Press, 2003).

If these questions are not settled empirically, neither will their political debate be over. In June 2014, the UNHRC adopted two human rights and business resolutions. One was advanced by the Core Group of States supportive of the GPs.[41] The other, proposed by group of States led by Ecuador and South Africa, pushed for the establishment of an intergovernmental working group with a mandate to elaborate an international legally binding instrument on human rights and transnational corporations.[42]

3. International human rights law and business: concepts and principles

3.1 Corporations as non-State actors under international law

Classically, public international law recognises only States as its actors and subjects.[43] Since positivist international human rights law takes the same position, its instruments principally address the relationship between States and individuals. International law does not therefore impose direct liabilities upon corporate actors for human rights violations, except in very exceptional cases[44] — a limitation that some human rights lawyers and advocates have questioned.[45]

Human rights instruments and jurisprudence do however assert the responsibility of non-State actors not to harm human rights. The preamble to the UDHR states that every individual and every organ of society is expected to promote human rights. Article 30 of UDHR further states that non-State actors have a duty to not engage in the destruction of rights.[46] Beyond this, though, international law as it currently stands does not provide precise and explicit legal standards for civil or criminal liability of corporations at the domestic level with regard to human rights abuses as such. Regional and national systems, however, have in some cases developed what might be termed "functional equivalents" of direct corporate liability, through jurisprudential developments connected to the State duty to protect, on one hand (see section 3.2 below), and civil causes of action in tort, on the other (as discussed further in section 8.2).

With regard to international criminal liability, the statute of the International Criminal Court provides for jurisdiction over natural, not legal, persons.[47] Individuals within or connected to corporations can however be held liable for acts of corporations leading to human rights abuses.[48]

41. Human Rights Council, Human rights and transnational corporations and other business enterprises, A/HRC/25/L.1. This resolution was supported by 22 countries.
42. Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/26/L.22/Rev.1 (24 June 2014). This resolution was supported by 20 countries. Commentaries from a range of actors, including the former SRSG, in response to Resolution and the idea of a treaty, can be found here: 'Binding Treaty', Business & Human Rights Resource Centre, http://business-humanrights.org/en/binding-treaty.
43. Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford: Oxford University Press, 1995), Ch.3.
44. These exceptions include where the company perpetrates or is complicit in genocide, war crimes and some crimes against humanity.
45. See Philip Alston et al, Non-State Actors and Human Rights (New York: Oxford University Press, 2005); Andrew Clapham, Human Rights Obligations of Non-State Actors (Oxford: Oxford University Press, 2006); Olivier De Schutter, Transnational Corporations and Human Rights (Oxford: Hart Publishing, 2006).
46. See also Article 17 of European Court of Human Rights, Council of Europe, European Convention on Human Rights (4 November 1950).
47. Art. 25§1. A motion was tabled to the Preparatory Committee and the Rome Conference to consider liability for legal persons, see Mordechai Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law', Journal of International Criminal Justice 8 (2010), 909; Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), Liability of Multinational Enterprises under International Law (The Hague: Kluwer, 2000).
48. In the IG Farben trial, 23 company directors of a German chemicals conglomerate that manufactured and supplied Zyklon B gas to Nazi extermination camps were prosecuted for crimes including war crimes and crimes against humanity: Law Reports of Trials of War Criminals, Vol. X (London: HMSO, 1949), and the International Criminal Tribunal of Rwanda convicted the owner of a company for its logistical support to the Rwandan genocide: Prosecutor v Nahimana, Barayagwiza, & Ngeze [3 December 2003] ICTR No. ICTR-99-52-T.

3.2 Extraterritoriality

Within human rights law, as in public international law more broadly, jurisdiction remains primarily territorial.[49] Jurisdiction over matters beyond the State's territorial boundaries is exceptional and requires an internationally recognised basis, such as nationality, where the actor in question, or the victim, is a national; where the acts concerned have significant adverse effects on State,[50] or universality; and where specific international crimes are involved.

On the basis of current rules, setting or enforcing standards for corporate behaviour in another State's territory, or adjudicating on matters that occur there, in the absence of one of the exceptional bases mentioned above, would exceed the jurisdiction of a home State, that is, the State in which a corporation is domiciled. The exercise of such jurisdiction may thus "prove controversial if other States regard it as interference in their sovereign rights to regulate corporations within their own borders and to pursue their own economic, social and cultural interests".[51]

The persistence of human rights abuses implicating TNCs, however, gives rise to ongoing debate about the extent to which current rules are adequate, with some commentators arguing for a more expansive interpretation of extraterritorial jurisdiction, based on the State duty to protect human rights and the doctrine of positive obligations.[52] Some UN treaty bodies, indeed, appear already to have taken this or similar positions.[53] Thus, the future direction of the issue of extraterritoriality remains open to speculation (see further section 8).

3.3 Positive obligations

Under most human rights instruments, State Parties agree to guarantee the effective enjoyment of the rights described to all persons within their jurisdiction. International law does therefore impose duties on States to ensure that private actors within their jurisdiction do not abuse human rights.[54] In the jurisprudence of the European Convention of Human Rights (ECHR), this duty to guarantee the effectiveness of human rights has led to the development by the European Court of Human Rights (ECtHR) of the doctrine of "positive obligations". This is discussed more fully in section 5.1 below.

49. Higgins, Problems and Process, Ch. 4-5.
50. See discussion on Singapore's Trans-boundary Haze Pollution Act in Section 8.3.
51. The EU reacted against US legislation that was viewed as a "violation of the territorial jurisdiction of EU Member States and an abuse of the nationality principle", in Daniel Augenstein, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union (University of Edinburgh, 2010), p.12, http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf.
52. Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", The Modern Law Review 70, no. 4 (2007), 598. See also Expert Meeting, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Centre of Human Rights and the International Commission of Jurists, 2011).
53. In particular, UN CESCR has indicated that States should "take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant" (Committee on Economic, Social and Cultural Rights, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, para. 5). CESCR has made similar statements in some of its Concluding Observations and General Comments. The UN Committee on the Elimination of Racial Discrimination (CERD) has also indicated that states should take appropriate measures to prevent adverse impacts on the rights of indigenous peoples from corporations registered in their state. See Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada, CERD/C/CAN/CO/18, 25 May 2007 [17]; Committee on the Elimination of Racial Discrimination, Concluding Observations: United States of America, CERD/C/USA/CO/6, 8 May 2008; Committee on the Elimination of Racial Discrimination, Concluding Observations: Australia, CERD/C/AUS/CO/15-17, 27 August 2010 [13]; Committee on the Elimination of Racial Discrimination, Concluding Observations: United Kingdom, CERD/C/GBR/CO/18-20, 14 September 2001.
54. See Velásquez Rodriguez v. Honduras [1989] 28 I.L.M 291 where the Inter-America Court of Human Rights held that states parties are required to take active measures to protect against, prosecute and punish private actors who commit human rights violations.

3.4 Serious or gross human rights violations or abuses

The term "abuses", rather than "violations", is used to refer to infractions of human rights by non-State actors as opposed to States or other public actors. However, international human rights law currently neither relies on nor defines the terms "serious" or "gross". Previously, this question gave rise to some discussion within the UN system, in connection with attempts to define the scope of the right to reparation for human rights violations. An early proposed definition of gross violations would have encompassed genocide, slavery and slavery-like practices; summary or arbitrary executions, torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination.[55] Yet, complexities were identified. For example, what should be the relationship between the widespread or systematic nature of violations or abuses, and their status as "serious" or "gross"? Ultimately, though the term "gross violations" was included in the relevant soft law standard, owing to various complications recognised in preparatory works, it was left undefined.[56]

Notwithstanding, the GPs mention "gross" human rights abuses in GP7, saying that such abuses are more likely in conflict-affected areas. Again, the term "gross" was left undefined, though the Interpretive Guidance on the GPs later produced by OHCHR does venture a definition. It states:

> There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave.[57]

What may be at stake here is the potential for the establishment of a hierarchy of corporate human rights abuses, with acts also counting as crimes against humanity having the status of "gross", while, for example, environmental devastation or land grab leading to loss of livelihood, would not. Many voices caution against such an approach.[58] In principle, corporations may in any case be charged for complicity with public actors in relation to crimes against humanity, at least where domestic criminal law permits, raising a question as to why a new legal regime is needed to address this category of wrongs (see next section on "complicity"). For now, the matter is thus open and likely to be the subject of much further debate.

3.5 Complicity

In criminal law, complicity is defined as aiding and abetting human rights violations committed by third parties.[59] A finding of complicity requires evidence of substantial contribution to the crime. In jurisdictions where corporations can be liable under criminal law, direct complicity could thus occur when a company knowingly and actively assists State actors in perpetrating human rights violations,

55. UN Sub-Commission on the Promotion and Protection of Human Rights, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report, E/CN.4/Sub.2/1993/8 (2 July 1993), p. 56.
56. UN Commission on Human Rights, Resolution 2005/35 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, E/CN.4/RES/2005/35 (19 April 2005), Preamble.
57. Office of the High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, HR/PUB/12/02 (2012), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, p. 6. This definition relied was adopted in the Zerk study referred to above (p. 27–28).
58. For example, see Global Initiative for Economic, Social and Cultural Rights, Submission to the UN Office of the High Commissioner for Human Rights on the Zerk Report on Corporate Liability for Gross Human Rights Abuses (May 2014), http://globalinitiative-escr.org/wp-content/uploads/2014/06/GI-ESCR-Submission-re-Corporate-liability-for-gross-human-rights-abuses-May-2014.pdf.
59. See further, Andrew Clapham and Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses", Hastings International and Comparative Law Review 24 (2000), 340.

or where it should have known that its actions would have those consequences, for example, where a company promotes, or assists with, forced relocations in circumstances that would constitute a violation of international human rights law.

Human rights scholars have identified other, non-legal forms of complicity relevant in the business context. Thus, a business benefiting from human rights violations committed by the State, where it knew that the benefits derived from an activity causing a human rights violation, might be guilty of beneficial complicity. Silent complicity, on the other hand, refers to corporate culpability where a business failed to exercise influence in a situation where it could have acted or drawn attention to systematic or continuous human rights abuses. For their part, the GPs stipulate that the extent of a company's responsibility to act varies according to whether it causally contributed to a violation or was merely linked to it.[60] It has been argued that this limited formulation excludes silent complicity and thus neglects some of the complex interconnections there can be between violations and corporate abuses of human rights.[61]

3.6 Sphere of influence versus leverage

The "sphere of influence" was a term used in early discussions of business and human rights. It encompassed the idea that: (i) a company has influence over people closest to a company and those that it has a special relationship to; (ii) within this sphere, a company is most likely to know, or ought to know, the human rights consequences of its actions or omissions; and (iii) the company has most power, authority, influence, leverage or opportunity within its sphere and thus should use this to prevent or mitigate human rights abuses.[62] But the SRSG challenged the concept, on the basis that it implies, '"can" equals "ought"'.[63] In his view, companies should not be held responsible for the human rights impacts of every entity over which they have some leverage because this would include cases that they are not contributing to, nor are the causal agent of the harm in question. The SRSG preferred that companies' responsibility be defined with reference to their impact on human rights, and what leverage the company might have over abuses through its business relationships.[64] The idea of leverage is discussed further in section 7.4 below.

SECTION II: IMPLEMENTING THE UN FRAMEWORK IN ASIA AND EUROPE

This section relates business and human rights developments in Asia and Europe. In line with respective governance configurations of the two regions, for Asia the national level and business-led initiatives provide the main focus, while in Europe's case, responses at regional level are highlighted.

4. An evolving business and human rights agenda in Asia

Rapid economic development has delivered growth and reduced poverty in a number of Asian States[65]. It has however also placed pressures upon marginalised, disenfranchised and disadvantaged groups whose human rights have been often traded off in the interests of short-term investment and financial gains. This manifests in systemic business-related human rights abuses, such as land-grabbing, gender discrimination, abusive working conditions, environmental degradation and associated violations of the rights to health, water, food, housing and livelihoods. Two-thirds of the world's

60. John Gerard Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31, 2011, Guiding Principles 13, 19.
61. Florian Wettstein, "Making Noise about Silent Complicity", in Surya Deva and David Bilchitz (eds.), Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect (Cambridge: Cambridge University Press, 2013), 243–268.
62. John Gerard Ruggie, Clarifying the Concepts of "Sphere of influence" and "Complicity", A/HRC/8/16, 15 May 2008.
63. Ibid.
64. Ibid.
65. General references to Asia in this section exclude Australia, New Zealand and Russia.

indigenous peoples live in the Asia-Pacific, and these communities often bear the brunt of growth-related human rights violations. Ethnic conflicts, corruption and institutional capacity problems also limit the human rights benefits that could derive from economic development in the region.[66] The impact on human rights from an influx of investment in countries in transition, such as Myanmar[67] and Cambodia requires particular attention.

Asian civil society actors have engaged with these issues from a human rights perspective. Asian companies and governments, however, have mostly addressed them through the lens of CSR. The advantage of this is that a growing number of firms in Asia are integrating CSR into their policies and practices. The CSR paradigm in Asia is however voluntary, top-down and philanthropic, making it difficult to embed human rights-compatible policies and practices into core business operations.[68] Compounding these challenges are the weak rule of law and human rights protection, high levels of corruption and the lack of watchdogs in the form of strong civil society and independent media in some Asian States.[69]

Where Asian companies have engaged with human rights as CSR, they have largely taken a risk-management approach, measuring risk to the corporation rather than risk to the human rights of individuals and communities. This is partly because Asian firms have usually adopted CSR practices to integrate into global value chains of TNCs: the pressure to do so whilst still maintaining competitiveness has sometimes resulted in a "de-coupling" of company policies from actual human rights impacts.[70] As an example, global garment retail brands have been known to keep "double-books" in order to satisfy both the ethical teams of global firms (who want good working conditions and fair wages for workers) as well as the buying teams (who want cheaper prices and faster turn-around times).[71] As such, this approach has not provided the optimal response to business-related human rights abuses.

State responses to the business and human rights agenda in Asia are in flux. A recent study on the State duty to protect human rights concludes that, by and large, ASEAN States have "fairly robust legal frameworks governing the core areas of land, labour and the environment".[72] Yet, these laws are not always being effectively implemented or enforced.[73] Similar conclusions can be reached with regard to the legal frameworks in the countries of South and East Asia.[74] Since the business and human rights discourse is still a 'State-driven act" in most of Asia, where the State does not actively demand corporate respect for human rights, this may signal to companies that human rights are not a requisite for operating within that State's jurisdiction.[75] Conversely, where the State does make clear that human rights is important, companies may be more likely to follow suit.[76]

66. "OHCHR Human Rights Programme for Asia-Pacific (2008-2009)", United Nations Office of the High Commissioner for Human Rights, http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AsiaPacificProgramme0809.aspx.
67. Ron Gluckman, "Why Western Oil Companies Love Myanmar's Moe Myint", Forbes Asia, 3 April 2013, http://www.forbes.com/sites/forbesasia/2013/04/03/why-western-oil-companies-love-myanmars-moe-myint/
68. Thomas Thomas and Alex Chandra, A baseline study on the nexus between corporate social responsibility and human rights: An Overview of Policies and Practices in ASEAN (ASEAN Intergovernmental Commission on Human Rights, 2014). Similar findings emerge from studies on CSR in China with regard to the predominance of philanthropy, as well as in other Asian states. See Jian Wang and Vidhi Chaudhri, "Corporate Social Responsibility Engagement and Communication by Chinese Companies", Public Relations Review 35, no. 3 (2009), 247–50; Bindu Sharma, 'Discovering the Asian Form of Corporate Social Responsibility', Social Space (2010), 28–35, https://centres.smu.edu.sg/lien/files/2013/10/SocialSpace2010-BinduSharma.pdf.
69. Carl Middleton and Ashley Pritchard, Corporate Accountability in ASEAN : A Human Rights-Based Approach (Asian Forum for Human Rights and Development, 2013).
70. Elisa Giuliani, Human Rights and Corporate Social Responsibility in Developing Countries' Industrial Clusters (Lund University, CIRCLE-Center for Innovation, Research and Competences in the Learning Economy, 2014).
71. Sumi Dhanarajan, "Managing Ethical Standards: When Rhetoric Meets Reality", Development in Practice 15, no. 3–4 (2005), 529–38.
72. Delphia Lim, "Synthesis Report", in Business and Human Rights in ASEAN: A Baseline Study (Human Rights Resource Centre, 2013),http://hrrca.org/system/files/u6/Business%20and%20Human%20Rights%20in%20ASEAN%20Baseline%20Study%20ebook.pdf
73. Ibid.
74. Thomas and Chandra (2014) as well as Lim (2013) reach similar findings apropos the ASEAN region, supra; Bindu Sharma, however, highlights Japan as the exception. See Bindu Sharma, "Contextualising CSR in Asia: Corporate Social Responsibility in Asian Economies", (Singapore: Lien Centre for Social Innovation, 2013), http://ink.library.smu.edu.sg/lien_reports/5/.
75. Robert J. Hanlon, Corporate Social Responsibility and Human Rights in Asia (New York: Routledge, 2014).
76. Hanlon looks at three countries: Thailand, Cambodia and China (Hanlon, supra). Larry Catá Backer, "China's Corporate Social Responsibility with National Characteristics: Coherence and Dissonance with the Global Business and Human Rights Project", in Jena Martin and Karen E. Bravo (eds.), Human Rights and Business: Moving Forward, Looking Back (2014), http://ssrn.com/abstract=2448030 or http://dx.doi.org/10.2139/ssrn.2448030

4.1 Laws and policy instruments

A recent ASEAN-based study suggests that weak enforcement of laws regulating corporate behaviour is due to a lack of implementation mechanisms, technical capacity and resources, inadequate awareness of relevant regulations, problems with central-local government coordination, pro-investment attitudes and policies that incentivise lax enforcement by local governments, and public corruption. Additionally, the pace of law reforms in this area is apparently out of synch with the ability of regulatory entities to implement and enforce provisions.[77]

Very few States have integrated provisions that address social and environmental impact into corporate governance laws. A rare example of this is Article 5 of China's Company Law which provides that:

> ... a company must, when engaging in business activities, abide by the laws and administrative regulations, observe social morals and business ethics, be in integrity and good faith, accept regulation of the government and the public, and undertake social responsibilities.

Directors and supervisors are required by law to act in a socially responsible manner towards internal and external stakeholders in pursuing shareholder wealth.[78]

A more common mechanism in Asia is CSR-type legislation imposing obligations on companies to contribute financially towards States' development policies, particularly in middle-income ASEAN States, where CSR is seen by governments as an opportunity to "fill funding gaps in key government programmes in education, livelihood development and health services, amongst others."[79] The Companies Act 2013 of India mandates companies to spend 2% of the previous three years' average net profit on CSR projects and activities in order to establish a culture of sustainable development governance and board level.[80] The Act includes the Corporate Social Responsibility Voluntary Guidelines previously issued by Ministry of Corporate Affairs (MCA) in 2009. Section 135 of the 2013 Act provides that every company having a net worth of a certain amount during any financial year shall establish a CSR committee of the board to put in place a range of community investment activities.[81]

Other examples of CSR-type legislation include the Philippines Corporate Social Responsibility Act of 2011, which mandates all large taxpayer corporations, whether domestic or foreign to allocate a reasonable percentage of their net income to CSR-related activities.[82] In Indonesia, various legislative provisions makes it mandatory for limited liability companies (domestic and foreign),[83] that manage, utilise or impact natural resources,[84] or are involved in mining,[85] or are State-owned enterprises[86] to

77. Delphia Lim and Geetanjali Mukherjee, "Business and Human Rights Challenges in ASEAN: The Role and Modalities of the State", in Mahdev Mohan and Cynthia Morel (eds.), Business and Human Rights in South East Asia: Risk and the Regulatory Turn (Taylor & Francis, 2014).
78. The People's Republic of China, Companies Law (2006), Articles 17, 18, 52, 117, 118 and 126. Article 17 requires a company to "protect the lawful rights and interests of its employees, conclude employment contracts with the employees, buy social insurances, [and] strengthen labour protection."
79. Thomas and Chandra, A baseline study on the nexus between corporate social responsibility and human rights.
80. Indian Ministry of Law and Justice, The Companies Act (No.18 of 2013) (29 August 2013), http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf
81. See Schedule VII, ibid.
82. These are tax-deductible and defined as charitable, scientific, relating to youth or sport development, educational, providing service to veterans and senior citizens or address environmental sustainability, social welfare health and disaster relief: Fifteenth Congress of the Republic of the Philippines, Senate Committee Report No 22, 16 March 2011, https://www.senate.gov.ph/lisdata/109799357!.pdf
83. The Republic of Indonesia, Law No. 25 of 2007 concerning Investment (2007), Article 15(b), http://www.bkpm.go.id/file_uploaded/Investment_Law_Number_25-2007.pdf. Article 34 of the said law provides for sanctions for non-compliance.
84. The Republic of Indonesia, Government Regulation No. 47 of 2012 Concerning Social and Environmental Responsibility of Limited Liability Companies (2012); The Republic of Indonesia, Law No. 4 of 2009 on Minerals and Coal Mining (2009), Articles 71, 79, 96 and 107; The Republic of Indonesia, Law of East Belitung Regency No. 13 on Corporate Social Responsibility (2011), Article 6; The Republic of Indonesia, Batam Law No. 2 on Corporate Social Responsibility (2012), Article 10.
85. The Republic of Indonesia, Government Regulation No. 23 of 2010 Concerning the Implementation of Mineral and Coal Mining Business Activity (2010).
86. The Republic of Indonesia, Law No. 19 of 2007 on the State-Owned Enterprise and Regulation of the Ministry of State-Owned Enterprise (2007).

make contributions to community development and empowerment,[87] and to disclose these in their annual reports. Law No.25 of 2007 concerning investment defines CSR as an inherent responsibility of every investor to continuously maintain harmonious and balanced relations with the environment, values, norms and cultures of the local communities.[88] In the Government of Indonesia's Medium-Term Development Plan of 2010-2014, CSR is seen as a funding scheme that contributes towards national development.[89]

No extant CSR-type legislation however reflects the GPs' human rights due diligence requirements (see further discussion in section 7.1). As a regulatory instrument, it has also been criticised for relegating State responsibilities for development to the private sector.[90] Emphasising corporate contributions may also divert attention from the adverse impacts of business operations and the State's duties to protect against them.[91] Whilst CSR-type legislation at least secures the concept of corporations having such responsibilities within the political and economic paradigm, there is a risk that these are overly associated with philanthropic obligations rather than what is termed "strategic CSR".[92]

In terms of Asian governments' policies on CSR, again, these only occasionally reference human rights per se although references to "social impacts or issues" could be seen as inclusive. In India, the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business state that businesses should respect and promote human rights and provides a framework for business responsibility reports, which includes a statement on their human rights policy as well as a statement on complaints of human rights abuses filed during the reporting period.[93]

China has perhaps been most prolific amongst the Asian States in promulgating such policy instruments.[94] The Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities issued by the State Owned Assets Supervision and Administration Commission (SASAC) in 2008 encourage State-owned enterprises (SOEs) to publish CSR or sustainability reports with information on the status of their CSR practices, planning and measures to improve CSR and to enhance the communication and dialogue mechanisms to facilitate responses to opinions and suggestions of stakeholders in the wider society.[95] Other Chinese examples include the Draft Guidelines on Performing Social Responsibility of Foreign Investment Enterprises as published by the Investment Ministry of Commerce, which encourage foreign companies to integrate best-practice CSR standards to "advance China's social fabric, having regard to their social and

87. Cornel B Juniarto and Andika D Riyandi, "Corporate social responsibility regulation in Indonesia", International Bar Association (2012), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=103427a1-0313-4d6c-b7f7-c5deb0bedbb5 and Lim and Mukherjee, 'Business and Human Rights Challenges in ASEAN'.
88. Ibid.
89. For example, Presidential Instruction No.3 of 2010 concerning the Equitable Development Program provides that the National Planning and Development Agency of Indonesia construct a Guideline for Harmonising CSR Implementation with the Acceleration of the Millennium Development Goals Attainment in Indonesia.
90. Lim and Mukherjee, "Business and Human Rights Challenges in ASEAN".
91. Ibid; Sabela Gayo, "Mandatory and Voluntary Corporate Social Responsibility Policy Debates in Indonesia", ICIRD (2012).
92. Ghuliani observes, for example, that given Indian companies still equate CSR with philanthropy rather than with addressing their social and environmental impacts of their operations, the legislation could distract companies who are poised to embrace "strategic CSR". (See Chhavi Ghuliani, "India's Company Act 2013: Five key points about India's CSR mandate", BSR, 22 November 2013, http://www.bsr.org/en/our-insights/blog-view/india-companies-act-2013-five-key-points-about-indias-csr-mandate).
93. See Shulagna Sarkar and Punam Singh, "CSR Guidelines for Indian Companies", Indian Journal for Corporate Governance 6, no. 1 (2013), 76; and Afra Afsharipour and Shruti Rana, "The Emergence of New Corporate Social Responsibility Regimes in China and India", UC Davis Business Law Journal 14 (2014), 175, http://ssrn.com/abstract=2472146, http://ssrn.com/abstract=2472146
94. Li-Wen Lin, "Corporate Social Responsibility in China: Window Dressing or Structural Change", Berkeley Journal of International Law 28 (2010), 64. The basis of these instruments, it has been argued, is the "harmonious society" concept put forward by President Hu Jintao in 2005, the purpose of which was to reconcile aspects of the Chinese socialist market economy with the problems faced in "rural areas, farmers and agriculture, the drainage of farmland, heavy pressure in the workplace and an incomplete social security system". See "Harmonious Society", People's Daily, 29 September 2007. Cited in Jingchen Zhao, Corporate Social Responsibility in Contemporary China (Cheltenham: Edward Elgar Publishing, 2014).
95. See Section 18 in "Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities", State-owned Assets Supervision and Administration Commission of the State Council (SASAC), the People's Republic of China, http://www.sasac.gov.cn/n2963340/n2964712/4891623.html.

environmental impact on Chinese society"; and the Shanghai Municipal Local Standards on Corporate Social Responsibility, 2008 issued by the Shanghai Municipal Bureau of Quality and Technical Supervision, which encourages enterprises to self-assess their CSR performance periodically and release the results to the community and employees.[96]

4.2 Stock exchanges and business-led initiatives

In Asia, various countries' stock exchanges have put in place either mandatory or voluntary disclosure requirements for social and environmental impacts. Apparently, stock exchanges based in emerging markets are on track to overtake those based in developed markets by 2015, in terms of the proportion of their large listings that disclose the seven first-generation sustainability indicators.[97] The Malaysian Stock Exchange, Bursa Malaysia, mandatorily requires listed issuers to annually report on the CSR practices and activities undertaken by them and their subsidiaries. In 2012, the Securities Commission adopted a CSR Framework and a Code for Corporate Governance that applies to government-linked and publicly listed companies. Further, the Bursa Corporate Governance Guide encourages directors to consider producing sustainability reports that address community involvement, equal opportunity, workforce diversity, human rights, supplier relations, child labour, freedom of association and fair trade. It has been recently announced that the Singapore Stock Exchange will follow suit with mandatory disclosure requirements for listed companies with regard to sustainability policies, social and environmental activities.[98]

Other bourses with environmental and social impact disclosure requirements — albeit voluntary ones — include the Stock Exchange of Thailand, which refers to human rights as one of the core subjects of social responsibility referencing ISO26000[99]; the Indonesian Capital Market and Financial Institution Supervisory Agency (Bapepam-LK); the Shenzhen Stock Exchange Social Responsibility Guidelines for Listed Companies[100]; the Shanghai Stock Exchange[101]; the Stock Exchange of Hong Kong Limited[102]; and the Securities and Exchange Commission of Pakistan (SECP)[103]. Some operate

96. Shanghai Bureau of Quality and Technical Supervision, Corporate Social Responsibility, DB31/421-2008 (2008), http://csrshe.com/info/3764-1.htm
97. Doug Morrow, Michael Yow, and Brian Lee, Trends in Sustainability Disclosure: Benchmarking the World's Stock Exchange (CK Capital, 2013), http://static.corporateknights.com/StockExchangeReport2013.pdf
98. Vaidehi Shah and Jessica Cheam, "SGX to make sustainability reporting mandatory", Eco-Business, 17 October 2014, http://www.eco-business.com/news/sgx-make-sustainability-reporting-mandatory/?utm_medium=email&utm_campaign=Oct+23+newsletter&utm_content=Oct+23+newsletter+Version+A+CID_846bc5f7b53d39a95ba3af16b9cee582&utm_source=Campaign%20Monitor&utm_term=READ%20FULL%20STORY
99. The Securities and Exchange Commission, in conjunction with the Corporate Social Responsibility Institute (under the Stock Exchange of Thailand), plans to make it mandatory for firms to disclose their CSR operations on form 56–1 and their annual report. Any firms planning to issue new securities will have to disclose whether they have operated in accordance with the 2012 guidance from 1 January 2014 onwards.
100. Listed companies are encouraged to establish a social responsibility mechanism prepare social responsibility reports on a regular basis. The disclosure requirements are mandatory for only companies in SZSE 100 index. The SZSE also trains companies on how to apply the guidelines. See: 'Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies,' Shenzhen Stock Exchange, www.szse.cn/main/en/rulseandregulations/sserules/2007060410636.shtml
101. Research & Corporate Development Department, Initiatives in Promoting Corporate Social Responsibility in the Marketplace by HKEx and Overseas Exchanges (Exchange, 2011), https://www.hkex.com.hk/eng/newsconsul/newsltr/2011/Documents/2011-10-13-E.pdf
102. In 2012, it published its Consultation Conclusions on Environmental, Social and Governance Reporting Guide as a guide for 'recommended practice' within the Listing Rules, but there are plans to establish a "comply or explain" basis of ESG reporting by 2015. Entities following the guide make disclosures on workplace quality, environmental protection, operating practices, and community involvement.
"The Exchange Publishes Consultation Conclusions on Environmental, Social and Governance Reporting Guide", HKEx News Release, www.hkex.com.hk/eng/newsconsul/hkexnews/2012/120831news.htm
103. Its CSR Voluntary Guidelines 2013 are applicable to all public companies. They identify processes that companies can undertake to integrate CSR policies and practices including developing a CSR Policy, establishing a CSR consultative committee, disclosure and reporting practices and seeking independent assurance of CSR performance. The Board of Directors is expected to play an active role in formulating CSR policy. There is no set definition of CSR but the Guidelines suggest issues that companies can focus on including climate change, governance and product responsibility. See Securities and Exchange Commission of Pakistan, Corporate Social Responsibility Voluntary Guidelines 2013 (2013), http://www.secp.gov.pk/notification/pdf/2013/VoluntaryGuidelinesforCSR_2013.pdf and Nazish Sheka, "Regulating Corporate Social Responsibility in Pakistan", TBL Sustainability Advocacy, http://www.tbl.com.pk/regulating-corporate-social-responsibility-in-pakistan/

on a "comply or explain" principle, including Japan's Financial Services Authority (FSA)'s "Principles for Responsible Institutional Investors"[104]. India's Securities and Exchange Board mandates that the top 100 companies by market capitalisation meet this principle with regard to disclosures on their "National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business".

Sector-specific regulatory initiatives are also emerging. China Banking Association's Guidelines on CSR for Banking Financial Institutions apply to all banking institutions with corporate status in China. They address CSR in relation to economic responsibility, social responsibility and environmental responsibility and make recommendations for management control mechanisms and systems, and annual reporting on CSR.[105] The Guidelines on Social Responsibility for Industrial Corporations and Federation issued in 2011 encourage companies across a range of sectors[106] to establish a CSR system for management and to produce an annual report.[107] Finally, the Sustainability Reporting Guidelines for Apparel and Textile Enterprises set out indicators for Chinese companies publishing annual reports on sustainability.[108] The impact of these regulatory initiatives, however, is yet to be measured.

4.3 Asia and the GPs

The institutional uptake of the GPs in Asia has been low so far. At regional level, only the ASEAN Intergovernmental Commission on Human Rights (AICHR) has engaged with them specifically through its thematic study on CSR and human rights.[109] Its baseline study into the CSR practices of States, businesses, civil society and other actors in the region that reference human rights, is aimed at identifying promotional activities; tools and mechanisms that facilitate engagement between the different stakeholders; and mechanisms that enabled access to remedies for victims of corporate-related human rights abuses.[110]

The Asian landscape is changing, however, and current developments may lead to a greater prominence of the GPs in the future. Public protest against corporate-related human rights abuses is becoming more commonplace. With the aid of mobile communications technologies, these protests are supported through transnational advocacy where actors draw from international human rights standards.[111] Affected communities, with support from CSOs, are also increasingly seeking remedies in transnational fora, raising the profile of abuses and framing them as violations of international human rights standards. The struggle of some 450 families from the Koh Kong province in Cambodia provides a pertinent example. In response to alleged illegal land grab by the government in connection with new sugar plantations, the families filed complaints with the Cambodian courts against the sugar

104. "Global CSR Disclosure Requirements", Initiative for Responsible Investment at Harvard University, http://hausercenter.org/iri/about/global-csr-disclosure-requirements.
105. China Banking Association, Zhongguo yinhang ye jinrong jigou qiye shehui zeren zhiyin [Chinese Banking Social Responsibility Report of 2009], 2009, http://www.docin.com/p-281617256.html. Cited in Yunwen Bai, Michael Faure, and Jing Liu, "The Role of China's Banking Sector in Providing Green Finance", Duke Environmental Law and Policy Forum (2014), Vol. XXIV.
106. This covers national industrial federations and associations engaged in iron, steel, oil, chemicals, light industry, textiles, building materials, non-ferrous metals, electric power and mining.
107. This should address scientific development, environmental protection, energy conservation, production safety, interests of employees, interests of stakeholders and social commonwealth.
108. "China", Global Reporting Initiative, https://www.globalreporting.org/information/policy/initiatives-worldwide/Pages/China.aspx.
109. The report was completed in June 2014 but to date, the various country studies have not been made public. See "Workshop on CSR and Human Rights in ASEAN: Outcomes of the AICHR Thematic Study", ASEAN Intergovernmental Commission on Human Rights, 17 June 2014, http://aichr.org/press-release/workshop-on-csr-and-human-rights-in-asean-outcomes-of-the-aichr-thematic-study/.
110. The study sought to make recommendations for a common framework for the promotion of CSR and human rights in ASEAN in alignment with the ASEAN Socio-Cultural Community Blueprint's aspirations to incorporate CSR principles into the agenda of ASEAN-based businesses so as to contribute towards sustainable socio-economic development of ASEAN member states. See C.3 (29) of ASEAN, ASEAN Socio-Cultural Community Blueprint (ASEAN Secretariat, 2009), http://www.asean.org/archive/5187-19.pdf.
111. A large-scale strike against low pay by 30,000 workers at a Hong Kong-owned Chinese facility garnered so much attention that the strike ended when China's Ministry for Human Resources ordered the company to rectify the benefit payments. See Stephanie Wong, "Yue Yuen Resumes Production at Dongguan Factory After Strike", Bloomberg, April 28 2014, http://www.bloomberg.com/news/2014-04-28/yue-yuen-resumes-production-at-dongguan-factory-after-strike.html.

companies; with BonSucro, a socially-responsible sugar industry initiative; the Thai National Human Rights Commission, concerning the Thai sugar company involved; and with the U.S. National Contact Point for the OECD Guidelines on Multinational Enterprises in relation to the US-based company purchasing sugar grown in the plantations.[112] The victims also filed a case against the UK-based sugar companies seeking a declaration that they are the rightful owners of the sugar purchased by these companies from the Cambodian companies since it was produced on their land.

Increasingly, Asian companies operating in developing countries are applying or are compelled to apply international human rights standards to secure their social license to operate or to address the concerns raised. Where projects receive financing through international financial institutions or multinational banks, loan requirements may include impact assessments and human rights due diligence.[113] Malaysian corporations such as PETRONAS and Malaysian Smelting Corporation Berhad, in carrying out business in conflict zones in Iraq, Sudan, South Sudan, Myanmar and the Democratic Republic of the Congo (DRC), have had to respond to human rights concerns using the language of international standards. In 2012, the Chinese International Contractors Association released a Guide on Social Responsibility for Chinese International Contractors, the purpose of which is to encourage and guide those Chinese companies who take on overseas projects to manage their social and environmental impact and abide by disclosure standards.[114]

Finally, a focus upon responsible investment in Myanmar has drawn attention to business and human rights issues[115] that are prevalent throughout the region. Myanmar may prove to be the test-bed for business and human rights[116] in Asia, with knock-on national and regional effects. This is especially so given that the main investors in Myanmar are from the Asian region.

4.4 Critical business and human rights challenges in Asia

Although the region faces a range of concerns, the following four issues perhaps deserve particular attention at this time.

Land-grabbing: This is rampant in many countries across Asia,[117] and often connected to economic land concessions[118] supporting agro-industries such as palm oil, rubber and sugar, as well as extractive projects, forestry, special economic zones, large-scale infrastructure projects such as hydropower dams, tourism and property developments. Though business still accounts for most land-grabs, State land-grabs, directly or through SOEs or sovereign wealth funds, have increased.

Investment contracts and negotiations are usually opaque; affected communities are rarely forewarned and unlikely to participate in decision-making. Smallholder farmers, pastoralists, indigenous and nomadic peoples are amongst those most impacted by land-grabs by agro-businesses or extraction companies, with human rights violations often owing to a clash between customary and formal land ownership. These may include violations of the right to food, the right to adequate housing, the right to

112. "The Sre Ambel communities and the Koh Kong sugar plantation", EarthRights International, http://www.earthrights.org/legal/sre-ambel-communities-and-koh-kong-sugar-plantation; and "Koh Kong sugar plantation lawsuits (re Cambodia)", Business & Human Rights Resource Centre, http://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia.
113. Where a complaint is made through a mechanism such as the IFC's Compliance Advisor or Ombudsman office, international human rights standards would apply.
114. "The First Guidance on Social Responsibility of China's International Project Contracting Industry Officially Released", Ministry of Commerce People's Republic of China, http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/201209/20120908367021.html
115. U.S. Department of State, Fact Sheet: Burma Responsible Investment Reporting Requirements, U.S. Department of State, 19 June 2013, http://www.humanrights.gov/2013/06/19/fact-sheet-burma-responsible-investment-reporting-requirements/; Office of Foreign Assets Control (OFAC), US Department of the Treasury, General License No 17 (2012).
116. For example, note the establishment of the Myanmar Centre for Responsible Business, a joint initiative of the Institute of Human Rights and Business and the Danish Institute for Human Rights.
117. Surya P. Subedi, "Land Grabbing in Asia: The Response of International Law", in Andrew Harding and Connie Carter (eds.), Land Grabs in Asia: What Role for the Law? (Routledge, forthcoming 2015).
118. These are contracts between the government and a state or private actors that give the latter specific rights over the land for a (usually extended) period of time.

water, the right to self-determination, and exploitation of natural resources.[119] Civil and political rights violations abound where communities resist or protest against being displaced from their land. Over the longer term, the broader population may also suffer from human rights abuses especially where fresh-water supplies are threatened by large-scale acquisitions of arable land; and where extensive land areas are dedicated to mono-cropping, damage is done to ecological systems. Smaller-scale and urban land-grabs are equally pervasive in parts of Asia. With the rapid growth of cities, areas designated as "wasteland" are often acquired and evictions and displacement of communities in occupation likewise result in abuses.

Workers' rights abuses: According to the ILO, policies aimed at flexibilising labour through deregulation are a major contributory factor to poor working conditions in Asia.[120] Mostly, abuses occur within the labour-intensive manufacturing sector in global supply-chains, agriculture, mining, construction and infrastructure projects. Workers face excessive working hours, poor wages, forced overtime, poor health and safety conditions, physical abuses, race and gender discrimination, physical and sexual harassment, and restrictions on rights to freedom of association, movement and collective bargaining rights. A recent empirical study into the impact of voluntary labour codes of conduct indicates that whereas "outcome standards" such as health and safety can improve, often "process rights", such as rights to freedom of association and collective bargaining remain under threat.[121]

Nearly 21 million people are subjected to forced labour, with the Asia-Pacific region accounting for 56% of the total number.[122] Migrant workers arriving in receiving States such as Malaysia, Thailand, Singapore, Korea and Japan are not availed of the usual protections offered by labour laws. Under the threat of repatriation, many endure unreasonable wage deductions, excessive working hours, verbal, physical and sometimes sexual abuse. Employers regularly confiscate passports. When workplace accidents happen, they are often denied medical expenses or compensation for injuries sustained. Migrant workers rarely have the ability to organise effectively, nor is it common for local unions to help protect their rights.[123] Access to justice and remedies when abuses occur are regularly denied.

Many abused workers forgo the opportunity to raise their grievance through the formal channels for fear of losing their jobs and working permits. Further, the cost of not earning a wage during the grievance process is difficult to endure especially where the worker is in debt as a result of fees paid to recruitment agencies. Sometimes, loopholes in the law allow for repatriation to take place before the worker has a chance to engage the dispute resolution process. Workers' rights abuses disproportionately impact women workers operating at the lower end of value-chains[124] but sex-based discrimination is problematic higher up the value chain too.[125] Sexual harassment continues to be a serious problem.[126] As an example, a survey of female factory workers in Guangzhou found that up to

119. Sumithra Dhanarajan, "Transnational State Responsibility for Human Rights Violations resulting from global land grabs", in Andrew Harding and Connie Carter (eds.), Land Grabs in Asia: What Role for the Law? (Routledge, forthcoming 2015).
120. Sangheon Lee and Francois Eyraud (eds.), Globalization, Flexibilization and Working Conditions in Asia and the Pacific (International Labour Organization, 2008).
121. Niklas Egels-Zandén and Jeroen Merk, "Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights", Journal of Business Ethics (2013), 1–13.
122. International Labour Organization, Asian Development Bank, Women and Labour Markets in Asia: Rebalancing for Gender Equality (Thailand: 2011), http://www.adb.org/sites/default/files/pub/2011/women-labor-markets.pdf.
123. Jolovan Wham, Statement to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 7 April 2014, http://www.ohchr.org/Documents/HRBodies/CMW/Discussions/2014/JolovanWham.pdf.
124. Apart from abuses unique to women (e.g., lack of protection due to pregnancy) women are more likely than men to be hired on short-term, casual, seasonal or homework contracts. See Kate Raworth, "Trading Away Our Rights: Women Working in Global Supply Chains", Oxfam Policy and Practice: Private Sector 1, no. 1 (2004), 1–52.
125. An ADB-ILO study revealed that gender inequality in wage differentials remains entrenched, with women typically earning 70%–90% less of men. See International Labour Organization, Asian Development Bank, Women and Labour Markets in Asia: Rebalancing for Gender Equality (Thailand: 2011).
126. In Australia, complaints of sexual harassment in the workplace were one of the most common complaints received by the NHRI. See "Sex Discrimination and Sexual Harassment", Catalyst (2014), http://www.catalyst.org/knowledge/sex-discrimination-and-sexual-harassment-0. In 2013, India passed the Anti-Sexual Harassment of Women at Workplace Act, to address a critical problem in the country. See Indian Ministry of Law and Justice, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (No.14 of 2013) (22 April 2013), http://wcd.nic.in/wcdact/womenactsex.pdf. In Japan, although sexual harassment is illegal, the Equal Employment office received 9,981 sexual harassment complaints, 60% of which were made by female employees in 2012. See "Women and Men in Japan 2013", Japan Gender Equality Bureau Cabinet Office, http://www.gender.go.jp/english_contents/pr_act/pub/pamphlet/women-and-men13.

70% had experienced this. Women are however starting to use the law to challenge discrimination, although with mixed success.[127]

Human rights defenders: Those who work on issues of corporate accountability in Asia are particularly at risk of death threats, physical violence, abductions, hounding by law enforcement, assassinations or various forms of harassment by the police, defamation campaigns, and threats against family members.[128] Attacks against these individuals have a high level of impunity with less than one in 10 cases properly investigated and prosecuted.[129] This problem is exacerbated where there is weak rule of law and if elite interests are threatened. Activists addressing the extractive industries and agri-businesses such as palm oil face some of the worst abuses.[130] Trade unionists and other workers' rights activists also face violence and intimidation. A recent international fact-finding mission on human rights defenders in the Philippines, for example, concluded, "there is compelling evidence that HRDs [human rights defenders]... are under serious threat, are constantly vilified, intimidated and 'terrorised.' A climate of pervasive and systematic impunity is at the heart of this alarming situation". The report highlights the effects of the ongoing militarisation including the emergence of multiple illegal private armies, legalised paramilitary groups, and the large-scale possession of armament contributes to the spread human rights violations with impunity.[131]

Corruption: This continues to be a serious problem in some Asian countries. According to Transparency International's (TI's) Corruption Perceptions Index of 2013, only nine of the 28 countries surveyed in Asia-Pacific scored above 50 points.[132] Further, TI's Bribe Payers Index 2011 identifies Indonesian and Chinese companies as having a high propensity to bribe when doing business abroad.[133]

Analysing corruption from a human rights perspective emphasises the harm caused to individuals and communities by corrupt behaviour and activities. Corruption can be directly linked to human rights abuse when a corrupt act is deliberately used to cause the abuse; or indirectly linked where it is an essential contributory factor to the human rights abuses; or creates the conditions that enable the abuse to take place and corruption disproportionately impacts upon marginalised and disenfranchised groups. Yet, little attention has been paid to the links between corruption and human rights in defining responses.[134]

5. European responses to business and human rights

As in Asia, understandings of both CSR and business and human rights in Europe, and responses to them have many influences. National politics, laws, institutions, attitudes and histories have influenced the configurations of national economies as they have the evolution of diverse mechanisms regulating business operations and their impacts. A marked difference between the two continents does exist, however, in terms of the contribution of regional-level institutions, in particular the Council

127. Tania Branigan, "China: Woman Settles in First Gender Discrimination Lawsuit", The Guardian, 28 January 2014, http://www.theguardian.com/world/2014/jan/28/china-woman-settles-first-gender-discrimination-lawsuit.; G Vinod, "Eight Women Lose Gender Discrimination Suit", Free Malaysia Today, 21 March 21 2012, http://www.freemalaysiatoday.com/category/nation/2012/03/21/eight-women-lose-gender-discrimination-suit/.
128. Special Rapporteur on the situation of human rights defenders, Situation of human rights defenders, A/69/259, 5 August 2014, http://www.ishr.ch/sites/default/files/article/files/sr_on_hrd_2014_report_to_ga.pdf.
129. See "Civil society identifies key issues for the new Special Rapporteur on Human Rights Defenders', International Service for Human Rights, http://www.ishr.ch/news/civil-society-identifies-key-issues-new-special-rapporteur-human-rights-defenders.
130. See "Thailand: Protect Human Rights Defenders Fighting Corporate Mining in Loei Province", Asian Human Rights Commission, http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-073-2014.
131. "Philippines: Defending Ancestral Lands: Indigenous Women Human Rights Defenders In The Philippines", Indigenous Peoples Human Rights Defenders Network, http://www.iphrdefenders.net/country-updates/philippines/237-philippines-defending-ancestral-lands-indigenous-women-human-rights-defenders-in-the-philippines.
132. The 2013 Corruption Perceptions Index measures the perceived levels of public sector corruption in 177 countries and territories around the world with 0 equating to "highly corrupt" and 100, to "very clean". See "Corruption Perceptions Index 2013: Asia Pacific", Transparency International, http://www.transparency.org/files/content/pressrelease/CPI2013_AsiaPacific_EN.pdf.
133. "Bribe Payers Index 2011", Transparency International, http://www.transparency.org/bpi2011.
134. International Council on Human Rights Policy (ICHRP), Transparency International, Corruption and Human Rights: Making the Connection (Geneva: 2009), http://www.ncjrs.gov/App/AbstractDB/AbstractDBDetails.aspx?id=248148.

of Europe (CoE) and the European Union (EU) to shaping the reception of the GPs in European States. As will be seen, this derives as much, if not more, from the pre-existing framework of human rights and other laws and policies established at regional level, as from specific measures taken since 2011 to promote the GPs' implementation.

5.1 Council of Europe

The Council of Europe (CoE) is the European region's principal human rights organisation. Of its 47 Member States, 28 are also EU members. All CoE Member States are parties to the European Convention on Human Rights (ECHR). Individuals can bring complaints of human rights violations under the ECHR to the European Court of Human Rights (ECtHR) in Strasbourg, once all possibilities of domestic remedy have been exhausted. The European Union is preparing to sign the ECHR, with the aim of creating a common legal space for Europe's 820 million citizens.[135]

5.1.1 The European Convention on Human Rights

Like other human rights treaties, the ECHR does not establish direct legal human rights obligations for corporations: only States can be sued before the ECtHR, and responsibility for human rights violations arises from the acts or omissions of public bodies, not private actors. Nevertheless, the ECHR as it has been interpreted and applied in cases by the ECtHR over past decades contains a number of protections relevant to business and human rights.[136] In other respects, however, the ECtHR's jurisprudence imposes limits on remedies potentially available to victims, particularly with regard to business-related abuses taking place outside Europe.

Positive obligations

As already noted above in section 3.3, based on the obligation on States under Article 1 ECHR "... to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention", the ECtHR has developed the doctrine of positive obligations, according to which, a State's duties are not restricted to abstaining from interference with human rights. Rather, States may be obliged to adopt protective or preventive measures, "even in the sphere of the relations of individuals between themselves", where this is necessary to protect human rights and provide remedies for abuses perpetrated by private individuals.

In some circumstances, the Court has considered that effective deterrence requires a State to criminalise private actors' conduct; in others, it warrants the adoption of legislation or policies, or the deployment of resources. Acquiescence or complicity with the acts of private individuals breaching ECHR rights can, in addition, engage State responsibility,[137] even where agents of the State act ultra vires or contrary to instructions.[138] This rule has been widely applied by the ECtHR to hold States responsible for abuses by non-State actors.[139] States are also obliged to provide effective remedies for human rights violations, regardless who the perpetrator is, and whether they are public or private.

Cases where the doctrine of positive obligations has been applied have included a number where States have been found liable for breaches of the ECHR as a result of failure to protect individuals

135. Accession of the EU to the ECHR became a legal obligation under the Treaty of Lisbon, Article 6, and is foreseen by Article 59 of the ECHR as amended by Protocol 14. On 17 March 2010, the Commission proposed negotiation of Directives for the EU's accession to the ECHR (IP/10/291).
136. See Jörg Polakiewicz, "Corporate Responsibility to Respect Human Rights: Challenges and Opportunities for Europe and Japan", CALE Discussion Paper No. 9 (2012), 8.
137. Ireland v. UK [1978] Judgment of 18 January 1978, Series A, no. 25, p. 64, §159.
138. Cyprus v. Turkey [2001] ECHR GC No. 25781/94-IV, §81.
139. For example, see Osman v. UK [1998] Judgment of 28 October 1998, Reports 1998-VIII, p. 3164 (relating to Article 2); Ireland v. UK [1978] Judgment of 18 January 1978, Series A no. 25, p. 64 (relating to Article 3); Siliadin v. France [2005] Judgment of 26 July 2005 (relating to Article 4); Storck .v Germany [2005] Judgment of 16 June 2005 (relating to Article 5); Wilson and Others v. UK [2002] Judgment of 2 July 2002 (applications nos. 30668/96, 30671/96 and 30678/96).

from interference with human rights resulting from the acts of corporations.[140] The Court has held that a "state's responsibility in environmental cases may arise from a failure to regulate private industry," or from failing to fulfil the positive duty "to take reasonable and appropriate measures" to secure rights.[141] A limitation, though, is that the actions or defaults of the State or public actors should have "sufficiently direct repercussions" on human rights; it may be required to show that the abuse would definitely have been prevented had the State taken measures that could reasonably have been expected.[142]

In relation to the acts of -owned or controlled enterprises or companies performing public functions that may breach human rights, under the ECHR, the State can be held directly responsible. The ECtHR has held that the "State cannot absolve itself entirely from its responsibility by delegating its obligations to secure the rights guaranteed by the Convention to private bodies or individuals."[143] This principle is, of course, of potential relevance in connection with the "contracting" out of the delivery of public services. A combination of criteria is applied by the ECtHR to determine whether a corporation, on a given occasion, was acting as an agent of the State.[144] These include: the corporation's legal status, asking, for example, whether it is established under public law, or as a separate legal entity under private law; the rights conferred upon the corporation by virtue of its legal status, where the question is whether the corporation enjoys rights normally reserved to public authorities; whether the corporation is institutionally independent; whether the corporation is operationally independence, with reference, for instance, to de jure or de facto State supervision and control; the nature of the corporation's activity in question — whether it is ordinarily considered to be a "public function" or rather "ordinary business" activity; the context in which the corporate activity is carried out, considering issues such as whether the corporation has a monopoly position in the market.[145]

A second avenue by which the ECtHR subjects the acts of corporations to review, indirectly, is through its consideration of the rights-compatibility of domestic court cases between private parties, one of which is a private business entity. Cases of this kind adjudicated by the ECtHR to date have considered workplace discrimination, freedom of association and collective bargaining,[146] privacy against media intrusion,[147] and freedom of expression and to receive information.[148]

Extraterritoriality

In general the scope of application of ECHR, like other treaties, is territorial and "jurisdiction" under Article 1 refers to the national territory of contracting States. Only exceptionally, then, are acts or omissions performed or producing effects outside a State's territory within ECtHR's jurisdiction.[149]

140. In Lopez Ostra v. Spain [1994] ECHR App. No. 16798/90, 303-C (ser. A), Spain was held liable for failing to protect residents from environmental and health problems at a nearby waste treatment facility.
The plant was built on State property and funded by state subsidies. The ECtHR found the interference with the rights protected by Article 8 was disproportionate and hence unlawful. In Taşkin and Others v. Turkey [2004] ECHR No. 46117/99 10, the State failed to prevent environmental damage by a private gold mining company, breaching the rights of local residents. In Guerra and Others v. Italy [1998] ECHR App. No. 14967/89, 7, the state was held liable for having failed to inform the local population about the potential for accidents at a chemical factory.
141. Fadeyeva v. the Russian Federation [2005] ECHR No. 55273/00, §89 and §92. The case related to a private steel point. The ECtHR held that the state was "certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them," giving a "sufficient nexus between the pollutant emissions and the State Applying similar reasoning, the case of Powell and Rayner v. the UK [1990] concerned nuisance caused to the applicants by a private airport.
142. E and Others v. UK [2002] ECHR (a case concerning private psychiatric care).
143. Van der Mussele v. Belgium [1983] Judgment of 23 November 1983, Series A no. 70, pp. 14–15, §§ 28–30; Costello-Roberts v. UK [1993] Series A no. 247–C, § 27; Storck v. Germany [2005] Judgment of 16 June 2005, § 103.
144. Polakiewicz, "Corporate Responsibility to Respect Human Rights", 16.
145. Yershova v. Russia [2010] Judgment of 8 April 2010 §§ 55–58.
146. Young James and Webster v. UK [1981] ECHR.
147. Axel Springer AG v. Germany [2012] ECHR, Von Hannover v Germany [2012] ECHR–GC, no 2.
148. Steel and Morris v. UK [2005] ECHR.
149. Al Skeini and Others v. the United Kingdom [2011] ECHR GC §§ 131 et seq; Issa and Others v. Turkey [2004] Judgment of 16 November 2004, §§ 68 and 71; Isaak v. Turkey [2006] Decision of admissibility of 28 September 2006; Ilaşcu and Others v. Moldova and Russia [2004] ECHR GC App. No 48787/99, §§ 314 and 318.

The ECHR can apply where a State exercises effective overall control over a foreign territory, or authority and control over individuals outside their own territory; but even then, it will apply only to the acts or omissions of State organs. According to one authoritative source, "It must therefore be concluded that the Convention does not generally require High Contracting Parties (HCPs) to exercise control on the conduct abroad of business enterprises incorporated under the High Contracting Parties' laws or having their headquarters in their territories, even when such conduct leads to human rights abuses."[150] This is despite the obligation on States to provide an effective remedy before a national authority for any violation under the ECHR.[151] While corporations are entitled to enjoy Convention rights,[152] overall, and with the exception of State-owned enterprises, it can be concluded that the ECHR "does not apply directly to private entities, nor is there any case law so far requiring HCPs to control the activities of their MNES operating abroad, even if they participate in or otherwise contribute to human rights abuses".[153]

As the discussion relating to Working Groups I to III will highlight, these general principles enunciated and given effect to by the ECtHR in decided cases, and the possibilities and limitations they pose, provide a large component of the international legal basis for the UN Framework and have strongly influenced its three key elements of the state duty to protect, corporate responsibility to respect, and the right of victims to remedy. Extraterritoriality in relation to European civil law is considered further under Working Group III.

5.1.2 The European Social Charter

The European Social Charter (ESC) is the second major human rights treaty of the Council of Europe, guaranteeing social and economic human rights, besides the ECHR's protections for civil and political rights.[154] The European Committee of Social Rights monitors compliance with the ESC through State reports, and decides on collective complaints that may be brought by European social partners.[155] Less often relied on in the past than the ECHR, the financial crisis and austerity measures have brought the ESC into renewed focus.[156]

The ESC establishes rights including those to a safe, healthy, just and dignified working conditions, a living wage, freedom of employment and protection in cases of termination of employment, association and collective bargaining, non-retaliation against workers' representatives, other collective workplace rights, vocational training, health, social security, free movement of workers, equal treatment, and to protection against poverty and social exclusion. Employed women, children, the persons with disabilities, the elderly and the family are entitled to additional protections.[157] The ESC thus contains many provisions with potential to impact on relations between businesses and individuals. However, as with the ECHR, obligations under the ESC are addressed to States, not businesses, albeit with scope for reliance on the notion of positive obligations. Similarly, it also applies only to the metropolitan territory of each party.[158]

150. Polakiewicz, "Corporate Responsibility to Respect Human Rights", 14.
151. European Court of Human Rights, Council of Europe, European Convention on Human Rights, Article 13.
152. There are numerous cases where corporations have benefited from the protection of the ECHR: for an overview, see Marius Emberland, The Human Rights of Companies: Exploring the Structure of ECHR Protection (Oxford: Oxford University Press, 2006).
153. Polakiewicz, "Corporate Responsibility to Respect Human Rights", 31.
154. Council of Europe, European Social Charter (1996), http://www.coe.int/T/DGHL/Monitoring/SocialCharter/.
155. The social partners include the European Trade Union Confederation, ESCR Business Europe and the International Organisation of Employers, international NGOs with participatory status in the CoE, and social partners at national level. Any state can give national NGOs the right to bring complaints before the ESC but to date only Finland has taken this step.
156. See, for example, European Union Agency for Fundamental Rights, The European Union as a community of values: safeguarding fundamental rights in times of crisis (Luxembourg: Publications Office of European Union, 2013),http://fra.europa.eu/sites/default/files/fra-2013-safeguarding-fundamental-rights-in-crisis_en.pdf.
157. "European Social Charter (revised) CETS No.:163", Council of Europe, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG
158. Marangopoulos Foundation for Human Rights v. Greece Collective [2005] ECSR Complaint No.30/2005, Case Doc. No.1.

5.1.3 New standards on human rights and business

Within the Council of Europe, the Steering Committee on Human Rights (CDDH) sets standards on human rights. Since 2011, at the request of the Council of Europe's Committee of Ministers, a process has been undertaken to develop new standards specifically addressing business and human rights.

Already this has led to the conclusion of a new Declaration of the Committee of Ministers on the United Nations Guiding Principles on Business and Human Rights. The Declaration expresses strong support for implementation of the GPs by Council of Europe Member States, calling on them, inter alia, to take appropriate steps to protect against human rights abuses by companies; to formulate and implement policies and measures to promote that all business enterprises respect human rights, within and beyond national jurisdictions; to ensure access to remedy within their territory and/or jurisdiction, and to develop national action plans (NAPs) on business and human rights.[159]

Beyond this Declaration, in September 2014, a Draft Recommendation of the Committee of Ministers to Member States on human rights and business was discussed.[160] This soft legal standard, if adopted, would recommend to the CoE governments that they, inter alia:

- Review national legislation and practice to ensure compliance with legal requirements and standards on business and human rights;
- Evaluate the effectiveness of measures taken at regular intervals;
- Share their NAPs and best practices of implementing the GPs and present these via a shared information system, to be established and maintained by the Council of Europe, and accessible to the public; and
- Engage in a peer discussion process with the participation of all relevant stakeholders, including business, to review progress.

Attached to the Draft Recommendation is a substantial Appendix, which includes guidance for States in a number of areas, in particular those addressed by Pillars I and III of the UN Framework.[161] Notably, regarding extraterritoriality, the Draft Recommendation states that this should have the same meaning as under Article 1 of the ECHR. As discussed above, this would entail that extraterritoriality should be understood as remaining exceptional and not generally applicable to the conduct of private companies outside Council of Europe Member States, unless one of the special circumstances noted above has been met.

5.2 European Union

The founding vision of European federalists following World War II may be described, somewhat crudely, as that of binding Europe together in peace through commerce. Though not an explicit goal initially, over time, it became evident that, beyond dismantling of barriers to trade and free movement of goods, certain rights and freedoms for workers, and common minimum standards in areas such as product safety, and environmental quality were also necessary to avoid social dumping and market distortion, and to achieve a more fully integrated single European market.[162] Early EU legislation

159. Committee of Ministers, Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights (2014), https://wcd.coe.int/ViewDoc.jsp?id=2185745&Site=CM.
160. Council of Europe, Draft Recommendation of the Committee of Ministers to Member States on human rights and business, CDDH-CORP(2014)10 (22 August 2014), http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/hr_and_business/Documents/CDDH-CORP%20Draft%20Recommendation%20Human%20Rights%20and%20Business%20Final%20ENG.pdf.
161. The Draft also recalls CoE standards in a number of areas that address issues relevant to business and human rights, e.g. Article 12 of Convention on Cybercrime, Article 18 of Criminal Law Convention on Corruption.
162. See, for example, Christian Joerges, "What is left of the European Economic Constitution?", EUI Working Paper 13 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635402; and Christian Joerges and Florian Roedl, "Social Market Economy' as Europe's Social Model?", EUI Working Paper 8 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635362.

established the right of equal treatment in employment for women.[163] The Community Charter of Fundamental Social Rights of Workers of 1989 established a range of protections in the employment context. The later EU Equal Treatment Directive prohibits discrimination in the area of employment and working conditions on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, and applies to both the public and private sectors.[164]

Up to a point, protecting human rights in the context of business activities was then incidental to other regulatory aims in the EU, perhaps understandably so, given the Council of Europe's prerogative over setting and enforcing standards in the area of human rights. However, this demarcation of institutional competence was not to endure. Since the Treaties of Amsterdam and Lisbon, EU primary law explicitly provides for an EU that is "... founded on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."[165]

Under the Treaty on European Union, the European Charter of Fundamental Rights of 2000 is now afforded equal legal value to the EU's founding treaties and the market freedoms for which they provide. Thus, the Charter is legally binding on EU institutions and Member States when implementing or claiming exceptions from EU law.[166] Fundamental rights under the ECHR and Member States' common constitutional traditions also have the status of general principles of EU law[167], and the EU will itself accede to the ECHR.[168]

These developments have set the stage for a number of new legal dilemmas and policy challenges. Internally, the European Court of Justice has faced clashes between fundamental human rights and market freedoms. Whether the EU will in practice retain its character as an essentially market-based order, or is capable of resolving such conflicts without weakening human rights protections remains to be seen.[169]

A second set of tensions attach to the relationship between the EU's internal and external commitments to human rights. The EU has committed at various times to integrating human rights through all policy

areas and to aligning its external policies in particular with the European Charter.[170] Yet, critiques, including from the European Parliament (EP),[171] have long pointed to a lack of coherence between

163. Council of the European Communities, Council Directive on the implementation of the principle of equal treatment for men' and women as regards access to employment, vocational training and promotion, and working conditions, 76/207/EEC (9 February 1976), and Council of the European Communities, Council Directive on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood , 86/613/EEC (11 December 1986).
164. Council of the European Union, Council Directive establishing a general framework for equal treatment in employment and occupation, 2000/78/EC (27 November 2000), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078.
165. European Union, The Treaty on European Union (1992), Article 2.
166. European Union, The Treaty on European Union (1992), Article 6(1).
167. European Union, The Treaty on European Union (1992), Article 6.
168. European Union, The Treaty on European Union (1992), Article 6(2). A recent paper revives the case for EU accession to the European Social Charter, see Olivier De Schutter, "The Accession of the European Union to the European Social Charter", EUI Working Paper (2014), http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Presentation/PublicationCSEUEODeSchutterJuly2014_en.pdf.
169. See, for example, Anne CL Davies, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ", Industrial Law Journal 37, no. 2 (2008), 126–48; Cf. Eric Engle, 'A Viking we will go! Neo-corporatism and Social Europe', German Law Journal 11(6) (2010), 633.
170. Commission of the European Communities, Communication from the Commission to the Council and the European Parliament — The European Union's role in promoting human rights and democratization in third countries, EU Doc COM/2001/0252 final (2001).
171. The EP has passed resolutions regarding companies and their impacts since 1999. Recently, see Committee on Employment and Social Affairs, Report on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery (2013), http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0023&language=EN. European Parliament, Resolution on Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth, A7-0017/2013 (6 February 2013).

the Union's domestic human rights regime and measures in areas such as trade, commercial, foreign policy and development whose impacts on human rights in countries outside the EU have been claimed to be often negative.[172]

5.2.1 CSR and business and human rights in EU policy

The evolution of EU policies on corporate social responsibility reflects these broad tensions, as well as changing ideas in the EU and world at large about the role of business in society and sustainable development, models for EU-level law and policy-making and approaches to business regulation.[173]

Published after the UN Human Rights Council's adoption of the GPs,[174] and also after the start of the global financial crisis, the European Commission Communication on CSR of 2011 marks the EU's first explicit engagement with business and human rights, and departs from previous EU CSR policy in a number of respects.[175] Most significantly, in the present context, this concerns the definition of CSR. Up to 2011, the EU defined CSR as "a concept whereby companies integrate social and environmental concerns in their business". The 2011 Communication, by contrast, makes a point of re-defining CSR as "the responsibility of enterprises for their impacts on society": CSR is thus no longer just an idea, but has become more of a social reality. Though still emphasising the "business case" for CSR, in terms of competitiveness, risk management, cost savings and access to capital, for instance, this responsibility now integrates the need to respect legal standards, including human rights standards: CSR, assumes "respect for applicable legislation, and for collective agreements between social partners", excluding the notion of CSR as purely voluntary affair.

Reinforcing this, the policy asserts a specific approach for European businesses to adopt, consequent on their responsibilities to society:

> To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:
>
> - maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;
> - identifying, preventing and mitigating their possible adverse impacts.

172. See discussions on EU approaches to trade and investment under WG1 and contributions in Philip Alston (ed.), The EU and Human Rights (Oxford: Oxford University Press, 2000) and Daniel Augenstein, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union (University of Edinburgh, 2010), http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf. On TNCs, the European Parliament has proposed measures including a binding code of conduct for EU companies in developing countries and a remedy mechanism for victims from third countries in EU national courts: European Parliament, Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct (2009).
173. See, for example, Daniel Kinderman, "Corporate Social Responsibility in the EU, 1993-2013: Institutional Ambiguity, Economic Crises, Business Legitimacy and Bureaucratic Politics", Journal of Common Market Studies 51(4) (2013), 701; and Olivier De Schutter, "Corporate Social Responsibility European Style", European Law Journal 14, no. 2 (2008), 203–36.
174. 2009 Swedish Presidency and incoming Spanish Presidency of the EU held a conference "Protect, Respect, Remedy" on CSR, concluded that "EU and its MS [Member States] should take a global lead and service as a good example on CSR…" and expressed support for the UN Protect Respect Remedy framework. See also Danish EU Presidency, From Principles to Practice: The European Union operationalizing the United Nations Guiding Principles on Business and Human Rights, Expert Conference (Copenhagen: 2012).
175. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU strategy 2011-14 for CSR, COM(2011) 681 final (25 October 2011), http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF (known as the EU Strategy for Corporate Social Responsibility). The Communication states, "The economic crisis and its social consequences have to some extent damaged consumer confidence and levels of trust in business. They have focused public attention on the social and ethical performance of enterprises."

A number of dedicated measures on human rights are then laid out. Responding to the GPs' call for governments to communicate clear expectations to business under Pillar I of the UN Framework, the EU policy states a clear expectation by the Commission on all EU companies "to meet the corporate responsibility to respect human rights as defined in the GPs". Commitments were also made by the Commission to develop guidance based on the GPs for specific industry sectors, as well as small and medium enterprises (SMEs), based on the GPs (such guidance has now been produced, see further WG1 below) and to report on EU-level priorities for the implementation of the GPs.[176] As to the "external" dimensions of business and human rights, in other words, impact beyond EU borders, the policy commits only to "Identify ways to promote responsible business conduct in its future policy initiatives towards more inclusive and sustainable recovery and growth in third countries."[177]

In the area of Pillar II, the Communication invited large European enterprises "to make a commitment to respect the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" and to take account of the GPs or another "GP-aligned framework" when developing their approach to CSR, both by 2014.[178] The Commission then undertook to "monitor the commitments made by European enterprises with more than 1,000 employees to take account of internationally recognised CSR principles and guidelines, and take account of the ISO 26000 Guidance Standard on Social Responsibility in its own operations."[179] Yet, as further discussed in Section 7.2 below, a 2013 study for the European Commission, surveying a sample of European companies found that only 33% referred to the UN Global Compact, OECD Guidelines or ISO 26000, and only 3% to the GPs as such.[180]

5.3 NAPs: Connecting regional and national action on business and human rights

An invitation was also issued to EU Member State governments by the Commission's 2011 CSR Communication, namely, to develop NAPs to support the implementation of the GPs.[181] This invitation built on, but went beyond, an earlier request to EU Member States to produce NAPs on CSR. At the time of writing, 24 of the 28 EU Member States had already developed, or were in the process of developing, a CSR NAP.[182] To support Member States in implementing and improving their respective CSR plans, the European Commission set up a process of peer review of CSR NAPs in 2013, based on collaborative working among small groups of States to scrutinise measures taken on a constructive basis, and share best practices.[183]

176. Section 4.8.2, p.14. Though a commitment was made to identify EU level priorities by end 2012, publication of this report is still awaited.
177. Ibid, p.15.
178. In this connection, the Communication refers to the OECD Guidelines for MNEs, ISO26000 Guidance Standard on Social Responsibility, and the UN Global Compact.
179. Ibid, p.13.
180. Only 2% of surveyed companies referred to the ILO MNE Declaration. See Caroline Schimanski, An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles (European Commission, March 2013), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf.
181. This request was repeated and reinforced by the Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12 (25 June 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.
182. Including Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Malta, the Netherlands, Spain, Sweden, and the United Kingdom. See European Commission, European Commission Communication on CSR 2011: Implementation Table (March, 2014), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/csr_agenda.pdf. At least two Member States' CSR plans also include measures in support of the GPs. See The Danish Government, Action Plan for Corporate Social Responsibility (May 2008), http://samfundsansvar.dk/file/318799/action_plan_CSR_september_2008.pdf, and Government of Cyprus Planning Bureau, National Action Plan for CSR (2012), on file.
183. European Commission and ICF GHK, Peer Review Report: Peer Review on CSR (The Hague: 28 November 2013), http://ec.europa.eu/social/BlobServlet?docId=11477&langId=en.

At the time of writing, four EU Member States have published NAPs.[184] Given the reliance on NAPs placed by the Council of Europe's Draft Recommendation on business and human rights, and the new focus on NAPs by the UN Human Rights Council in its 2014 business and human rights resolution, NAPs, as a vehicle for promoting implementation of the GPs and other business and human rights frameworks clearly hold strong potential relevance beyond the EU; notably, in this regard, the US Government has recently committed to develop a NAP.[185] Consequently, the approaches followed by those EU Member States that have already concluded NAPs, and an outline of their contents is briefly described here.[186]

United Kingdom: The UK Government was the first to publish a NAP.[187] This followed a process marshalled by a cross-departmental steering group, and a series of stakeholder workshops. The NAP applies to all UK government departments and is addressed to all businesses "domiciled" within the United Kingdom. It collates actions already taken that promote human rights in the business context, including the overall legal framework provided by UK legislation and policy. It also identifies some new measures taken specifically in response to the GPs, for example, responsible business investment guidelines for companies in Myanmar, and a requirement that new bilateral investment treaties incorporate a company's responsibility to respect human rights. The NAP commits all UK government departments to provide advice to companies about their human rights responsibilities. Acknowledged as a starting point, a promise is made to review its effectiveness and issue a new NAP in 2015.

Denmark: Here, the decision to develop a NAP followed a formal recommendation from Denmark's multi-stakeholder CSR Council, representing Danish trade unions, local municipalities, NGOs, business and financial organisations. Following a short dialogue with the CSR Council, although not wider stakeholder consultation, a NAP was published in 2014.[188] Like the UK NAP, Denmark's summarises actions already taken, however, this is done more transparently, through a table identifying, for each GP, its "status in Denmark", with reference to relevant domestic law and policies prior to 2011, as well as specific initiatives taken or planned "as a dedicated measure" to implement the GP in question since 2011. Some examples of the latter include: establishing an inter-ministerial Working Group to consider the issue of extra-territoriality; providing advice to and holding workshop for exporting companies on Responsible Supply Chain management via the Danish Trade Council; requiring companies involved in Danida Development Partnerships to undertake CSR due diligence including human rights, and including terms in contracts with such businesses to live up to the UN Global Compact; and supporting human rights in the negotiation of international standards (e.g. the OECD Common Approaches on export credit) and agreements (e.g., trade and development clauses in EU trade agreements).

184. A list of published NAPs and NAPs in development worldwide is maintained in the "National Action Plans", Business and Human Rights Resource Centre, http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans. Though not discussed here, draft NAPs have been published by Italy and Spain. See Government of Italy, The Foundations of the Italian Action Plan on the United Nations "Guiding Principles on Business and Human Rights" (2014), http://business-humanrights.org/media/documents/foundations-ungps-nap-italy.pdf; and Government of Spain, Draft of National Action Plan on Business and Human Rights (2013), http://www.business-humanrights.org/UNGuidingPrinciplesPortal/ToolsHub/Governments/TypeInitiative/natlactionplans.

185. The commitment was announced by President Obama on 24 September 2014: "Fact Sheet: The U.S. Global Anticorruption Agenda", Office of the Press Secretary, The White House (September 24, 2014), http://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda. Switzerland has initiated a process towards the development of a NAP.

186. For a fuller discussion, see Claire Methven O'Brien et al., National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks (The Danish Institute for Human Rights, The International Corporate Accountability Roundtable, 2014).

187. Foreign and Commonwealth Office, Good Business: Implementing the UN Guiding Principles on Business and Human Rights (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf.

188. The Danish Government, Danish National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights (2014), http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf.

The Netherlands: Development of the Dutch NAP was prompted by a request from the Dutch Parliament. Led by the Ministry of Foreign Affairs, the NAP process proceeded with support from an inter-ministerial Working Group involving the Ministries of Economic Affairs, Finance, Security and Justice, and Social Affairs and Employment. An internal analysis of how Dutch policy lined up with the GPs was conducted, and separate consultations held with business representatives, CSOs and public agencies, to ensure to each a chance to voice their opinions adequately. Adopting a risk-based approach, the resulting NAP focuses on "five main points" that came up during the consultation process: (1) an active role for the government; (2) policy coherence; (3) clarifying due diligence; (4) transparency and reporting; and (5) scope for remedy.

Finland: This time led by the Ministry of Employment and the Economy, an inter-ministerial Working Group prepared the ground for Finland's NAP with a memo on the status of implementation of the GPs in Finland, on which stakeholders were invited to comment. Taking these inputs into account, a final NAP was published in October 2013.[189] Its key elements include: preparation of a baseline study to review consistency of Finnish legislation with the GPs; carrying forward respect for human rights in new legislation on public procurement, pursuant to the EU Public Procurement Directive; actions focused on State-owned enterprises; a review of the functioning of Finland's national contact point (NCP); and establishing a multi-stakeholder dialogue on human rights due diligence to identify requirements and best practices. Monitoring of implementation of the NAP is proposed to be undertaken on a multi-stakeholder basis via Finland's Committee on Corporate Social Responsibility.

A final word should be reserved for actions triggered amongst civil society by the arrival of NAPs in Europe. CSOs and NHRIs have separately[190] and together[191], engaged in advocacy around NAPs, both at the national[192] and regional[193] levels. In some cases, the formal input of NHRIs have been directly sought by governments.[194] Business associations and representatives have been involved in every NAP process to date. However, based on experiences so far, NAPs dialogues could still be better exploited as an opportunity to establish inclusive national discussion on business human rights impacts inside and outside the country's territorial jurisdiction. In particular, input from those representing groups experiencing discrimination in employment, access to goods and services, such as persons with disabilities and minorities, should be more actively sought; and regrettably, NAPs so far pay scant attention to the issue of gender, which should be of matter of concern given strong EU legal commitments in that area.

189. Ministry of Employment and the Economy, National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights, Publication 46/2014 (2014), http://www.tem.fi/files/41214/TEMjul_46_2014_web_EN_21102014.pdf.
190. A full list of responses and commentaries on published NAPs is maintained here: "National Action Plans", Business and Human Rights Resource Centre, http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans.
191. See, for example, coordinated responses to UNWG on NAPs by European Coalition for Corporate Justice (ECCJ), ICAR and DIHR: "ECCJ Contribution to the consultation on the National Action Plans on UNGPs", European Coalition for Corporate Justice, http://www.corporatejustice.org/UNWG-on-BHR-consultation-on-the.html?lang=en.
192. See, for example, Netherlands Institute for Human Rights, Advice: Response to the National Action Plan on Human Rights, "Knowing and Showing" (February 2014), http://business-humanrights.org/sites/default/files/documents/netherlands-nhri-re-national-action-plan.pdf ; and "Dutch National Plan on Business and Human Rights", Dutch MVO Platform, http://mvoplatform.nl/news-en/dutch-national-action-plan-on-business-and-human-rights.
193. The ECCJ will undertake a review of published EU Member States NAPs in 2014. See "National Action Plans UNGPs: an assessment", European Coalition for Corporate Justice, http://www.corporatejustice.org/National-Action-Plan-UNGPs-an.html?lang=en. The European Group of NHRIs published a Discussion Paper on NAPs in 2012. See European Group of National Human Rights Institutions, Implementing the UN Guiding Principles on Business and Human Rights: Discussion paper on national implementation plans for EU Member States (June 2012), http://business-humanrights.org/sites/default/files/media/eu-nhris-paper-on-national-implementation-plans-for-ungps-210612-short.pdf.
194. The French NHRI was requested by the government to develop recommendation: Commission Nationale Consultative des Droits de L'Homme, Business and human rights: opinion on the issues associated with the application by France of the United Nations' Guiding Principles (24 October 2013), http://business-humanrights.org/sites/default/files/media/documents/cncdh-opinion-france-ungp-oct-2013.pdf.

SECTION III: WORKING GROUPS

6. Working group I: State duty to protect

6.1 General regulatory and policy functions, and due diligence requirements

Pillar I of the UN framework reflects the position under international law that States must protect against abuses by third parties, including businesses, within their jurisdiction. Accordingly, GP1 requires States to protect rights-holders by taking appropriate steps to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations and adjudication, while GP2 obliges States to set out clearly the expectation that business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

The GPs give further guidance on four specific areas where State action is required to meet these obligations, providing that States should:

a) Enforce laws aimed at, or having the effect of, requiring business enterprises to respect human rights, and periodically assess the adequacy of such laws and address any gaps;
b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations; and
d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.[195]

There are two ways in which a State's laws can require businesses to respect human rights. First, a country's general laws can indirectly require business to respect human rights, by requiring them to meet standards of conduct and performance in areas such as labour, environment, health and safety, product safety and anti-corruption, where, without such laws, there would be violations of rights, for instance, the rights to life, health, freedom of association, equal treatment, and so on. Here, respecting human rights may be incidental to the explicit regulatory goal of the legislation. In many countries, current business practice already largely respects human rights because it is in line with such national legal requirements. The task then is in detecting shortcomings in the general legal and policy framework, which may result in human rights abuses occurring with impunity.[196]

Second, a State can enact measures specifically intended to secure business respect for human rights. Such measures need not explicitly injunct businesses "not to violate" human rights. Rather, their focus may be procedural, requiring or encouraging companies to undertake a process of due diligence by which they identify and respond to their actual or potential impacts on human rights (see further Working Group II below). Though many States already require companies to do due diligence in other areas, and human rights-specific due diligence requirements are for the time being rare, recent developments in France and Switzerland may indicate the beginning of a broader movement towards mandatory human rights and environmental due diligence as a matter of law.[197]

195. See Guiding Principle 3 in John Gerard Ruggie's Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework.
196. Such weaknesses may lie in the substance of legislation (e.g., failing to make unlawful discrimination on all grounds prohibited by international standards) or in its scope (e.g., exclusion of Special Economic Zones from application of legal regime applicable in the rest of the state).
197. Assemblee Nationale , Proposition de Loi relative au devoir de vigilance des societies meres et des entreprises donneuses d'ordre, No.1524 (6 November 2013); the Foreign Affairs Committee of Switzerland's Lower Chamber has called for draft legislation anchoring company due diligence requirements in law. See "A Milestone for Human Rights", Corporate Justice, 2 September 2014, http://www.corporatejustice.ch/media/medialibrary/2014/09/140902_sccj_-_swiss_foreign_affairs_committee_wants_mandatory_hrdd.pdf.

Some due diligence requirements have also been instituted in relation to specific human rights geographies and issues. The US government, for example, has introduced requirements for disclosure of companies' policies and processes in connection with new investments in Myanmar.[198] The UN Security Council endorsed due diligence for all companies sourcing minerals from Democratic Republic of Congo (DRC) in 2010,[199] and the OECD published Due Diligence Guidance for Responsible Supply Chain of Minerals concerning the sourcing of natural resources from conflict-affected and high-risk areas.[200] Following suit, Section 1502 of the 2010 U.S. Dodd Frank Wall Street Reform and Consumer Protection Act requires all companies listed with the US Securities and Exchange Commission (SEC) to carry out due diligence to a nationally or internationally recognised due diligence framework in order to determine whether their products contain minerals that have funded armed groups in the DRC or bordering countries. In parallel, 12 African States of the International Conference of the Great Lakes Region (ICGLR) have made meeting the OECD due diligence requirements a condition of their regional mineral certification scheme. In 2012, Congo's government introduced legislation requiring companies operating in its tin, tantalum, tungsten or gold mining sectors to undertake supply chain due diligence according to the OECD standard, and Rwanda's government adopted similar legislation. The Chinese government, through the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters has committed to launching a "Guideline for Social Responsibility in Outbound Mining Investments" during 2014.[201] The European Commission has proposed a regulation to establish a voluntary self-certification scheme, based on the OECD Guidance, for the 300–400 companies that import tin, tantalum, tungsten and gold ores and metals into Europe.[202] Together, these measures have prompted some significant changes in companies' sourcing practices.[203] Yet, a cost-benefit analysis undertaken for the European Commission in 2013 revealed that only 4% of 330 companies surveyed were voluntarily preparing a public report on how they identify and addressthe risk of funding conflict or abuses in their supply chains, raising questions about the efficacy of a voluntary approach at least in the European context.[204]

6.1.1 National action plans

Since 2011, there has been a concerted movement towards the idea that States should develop National Action Plans (NAPs) to support their implementation of the GPs and other business and human rights frameworks. As mentioned above in Section 5.3, the EU was the first authority to call for NAPS,[205] with the UN Human Rights Council following suit shortly after,[206] while the Council of Europe has called for States to develop NAPs in a recent Declaration of its Council of Ministers, and envisages supporting a periodic multi-stakeholder dialogue about NAPs in the future.[207] In response

198. "Burma Responsible Investment Reporting Requirements", U.S. Department of State, http://www.state.gov/r/pa/prs/ps/2013/05/209869.htm.
199. United Nations Security Council, Resolution 1952 (2010), S/RES/1952 (29 November 2010), http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1952(2010).
200. The Organisation for Economic Development and Co-operation (OECD), Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (Paris: Organisation for Economic Co-operation and Development, 2013), http://www.oecd-ilibrary.org/content/book/9789264185050-en.
201. The draft guideline includes supply chain due diligence in accordance with international standards
202. Proposal for a Regulation for "setting up a Union system for a supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas".
203. Global Witness, Seeing the Light: Responsible Mineral Sourcing from the DRC (2014), http://www.globalwitness.org/sites/default/files/Seeing%20the%20Light%20April%202014.pdf.
204. Katie Böhme, Paulina Bugajski-Hochriegl and Maria Dos Santos, Assessment of due diligence compliance costs, benefits and related effects on the competitiveness of selected operators in relation to the responsible sourcing of selected minerals from conflicts-affected area (Germany: European Commission, 2014), 61. A recent NGO study found that over 80% of 186 European companies surveyed did not provide any public information about the checks they had undertaken to ensure their supply chains had not funded conflict or human rights abuses. See SOMO, Conflict Due Diligence by European Companies (November 2013), http://somo.nl/news-en/sourcing-of-minerals-could-link-eu-companies-to-violent-conflict (note that 19 of the companies surveyed by SOMO (11%) are dual listed in the US and Europe, and so are directly impacted by Dodd Frank Act Section 1502).
205. European Commission, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 final (Brussels: 25 October 2011). Notably, 24 of 28 EU Member States had already developed, or were in the process of developing CSR-related NAPs and to support Member States, the European Commission set up a process of peer review of CSR NAPs in 2013.
206. Human Rights Council, Human rights and transnational corporations and other business enterprises, A/HRC/26/L.1.
207. Council of Europe, Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights (2014); Council of Europe, Draft Recommendation of the Committee of Ministers to Member States on human rights and business. For these and an overview of Council of Europe action on business and human rights, see 'Human Rights Law and Policy', Council of Europe, http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/hr_and_business/default_EN.asp.

to the EU's request, NAPs have, to date, been published by the governments of the UK, Denmark, the Netherlands, Italy and Finland, and are being prepared by a number of others.[208]

Civil society organisations and NHRIs have however emphasised the need for greater attention to the quality and completeness of NAPs.[209] One recent report has highlighted that, given the multiplicity of regulations that touch on business and human rights issues indirectly, which can include regulation by non-governmental public or private bodies, such as independent regulatory or licensing authorities, or stock exchanges, developing a coherent NAP requires a baseline analysis as a "stock-taking" exercise. The report also calls for NAPs processes themselves to be human rights-based, to ensure transparency, participation, and inclusion in particular by groups at risk of vulnerability and marginalisation such as indigenous populations, women and children.[210]

6.1.2 Providing effective guidance

Existing guidance provided by public bodies to companies on topics such as how to meet equal opportunities or health and safety requirements in the workplace, can obviously contribute to fulfilment of the GPs. However, a wide array of dedicated guidance for companies on how to respect human rights and, in particular, how to implement human rights due diligence, has also been produced, directly by governments or with their support. The EU, for instance, has published human rights guidance for employment and recruitment agencies,[211] the information and communication technology (ICT)[212] and oil and gas sectors,[213] as well as guidance for SMEs.[214] Yet, measuring the uptake of guidance by businesses can be difficult, making "effectiveness" hard to assess and no State, to date, has produced statutory human rights guidance, which companies would be legally obliged to follow, even if some appear to be venturing in this direction, through rules on corporate reporting, discussed above, and on public procurement, considered below.

208. An updated list of published NAPs is maintained by the UN Working Group on business and human rights. See "State national action plans", United Nations Office of the High Commissioner for Human Rights, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx. A brief summary of published NAPs is provided in section 5.3
209. For recommendations on NAPs to their governments from the NHRIs of France and the Netherlands, amongst others, see "National Action Plans", Business and Human Rights Resource Centre, http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans.
210. Claire O'Brien et al., National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks (The Danish Institute for Human Rights, The International Corporate Accountability Roundtable, 2014). This Toolkit is being used by governments and other stakeholders to inform and evaluate NAPs processes in a number of countries in Europe and the Americas. See further, "National Action Plans UNGPs: an assessment", European Coalition for Corporate Justice, http://www.corporatejustice.org/National-Action-Plan-UNGPs-an.html?lang=en.
211. Shift and the Institute for Human Rights and Business (IHRB), Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights (European Commission, 2013), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-era-hr-business_en.pdf.
212. Shift and the Institute for Human Rights and Business (IHRB), ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights (European Commission, 2013), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf.
213. Shift and the Institute for Human Rights and Business (IHRB), Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights (European Commission, 2013), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-oag-hr-business_en.pdf.
214. GLOBAL CSR and BBI International, My Business and Human Rights: A Guide to Human Rights for Small and Medium-Sized Enterprises (European Commission, 2012), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-sme-guide-final_en.pdf.

6.1.3 Promoting corporate reporting on human rights

In line with the concepts of sustainability and the "triple bottom line", social and environmental reporting is an established practice in an increasing number of countries. In Asia, India issued National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business in 2011, which encourage companies to disclose responsible business practices on "comply or explain" basis. In Europe, France was the first to mandate triple bottom line reporting for publicly listed companies in 2001, passing legislation requiring companies to report according to a set of qualitative and quantitative indicators on issues such as employee contracts, working hours, pay, industrial relations, health and safety, disability policies, community relations and environmental reporting.[215] Since 2004, the Netherlands has implemented benchmarking based on companies' CSR reporting. In Denmark, a non-financial reporting duty for the largest 1,100 companies and Danish State-owned enterprises was established in 2009.[216] The Danish Business Authority periodically evaluates the effectiveness of the reporting requirement,[217] and provides guidance on implementation for companies and auditors, who in turn award prizes for the best CSR reports. In 2012, Denmark set new requirements for the same class of companies to report specifically on business respect for human rights and climate change.[218] In 2013, Norway enacted legislation, requiring companies to report on steps to integrate considerations for human rights into their strategies.[219]

In 2014, after prolonged debate,[220] the EU resolved to adopt a new Directive requiring all Member States to implement non-financial reporting based on a "comply or explain" model.[221] Under the Directive, "public interest enterprises" with more than 500 employees must be required by national law to report annually on principal risks in relation to human rights, the environment and social impacts linked to their operations, relationships, products and services, as well as aspects related to bribery and diversity. They must also provide information on relevant policies, any due diligence procedures for identifying, preventing and mitigating risks identified, and significant incidents occurring during the reporting period.[222] Whilst the Directive has been welcomed as a step towards greater corporate accountability,[223] it has also been criticised for its narrow scope, given that only approximately 6,000 of 42,000 large companies incorporated in the EU are covered; potentially wide-ranging

215. The law was implemented through regulations adopted in 2012, Grenelle I Act 2009 and Grenelle II Act 2010.
216. Companies are required to report on social responsibility policies; how these are translated into action; and what has been achieved through them during the financial year, or, to indicate that they are not reporting. Instead of including social content directly in the annual financial statement, companies can refer to separate corporate sustainability reports, information on a company website or a UN Global Compact Communication on Progress. See The Danish Government, Action Plan for Corporate Social Responsibility. CSR reports are subject to a consistency check by auditors under the Danish Financial Statements Act §135.
217. The most recent analysis, undertaken by Copenhagen Business School, showed that almost all companies report on CSR (97%), while 41% report on human rights and labour rights — a significant increase from 19% doing so in 2009.
218. Kingdom of Denmark, Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct, Act no. 546, 18 June 2012, http://businessconduct.dk/file/298159/act-on-mediation.pdf. In scope, the requirement extends to business relationships.
219. KPMG, United Nations Environment Programme, The Global Reporting Initiative and The Centre for Corporate Governance in Africa, Carrots and Sticks: Sustainability Reporting Policies Worldwide-Today's Best Practice, Tomorrow's Trends (2013), 33–34.
220. "Non-financial reporting reform on thin ice", European Coalition for Corporate Justice, http://www.corporatejustice.org/Non-financial-reporting-reform-on.html?lang=en.
221. The European Parliament and the Council of the European Union, Directive 2014 of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, A7-0006/52 (4 August 2014). The Directive will enter into force in 2014 and Member States have two years to transpose it into national legislation. The European Commission is required to produce guidelines within one year to assist companies in reporting.
222. Public interest entities (PIE) are defined as listed companies, credit institutions, insurance undertakings and any other entity designated by an EU Member State as a PIE. In providing information, companies are to be guided by the GPs, the UN Global Compact, the OECD Guidelines for MNEs and the ILO Tripartite Declaration on principles concerning multinational enterprises and social policy, and risks must be disclosed regardless of what a company considers relevant or "material" to the interests of its shareholders.
223. "EU Directive on the disclosure of non-financial information by certain large companies: an analysis", European Coalition for Corporate Justice, http://www.corporatejustice.org/On-15-April-2014-the-European.html?lang=en

exemptions for information[224]; a weak clause on supply chains — a high risk area for many companies — that requires reporting only "when relevant and appropriate"; and the lack of a common reporting framework or indicators.[225] Moreover, the Directive does not provide for monitoring or mechanisms to sanction defaults by companies: auditors need only indicate whether non-financial information has been provided, or not.[226]

6.2 The State-business nexus

6.2.1 Government ownership, control or support

State-owned enterprises (SOEs) and corporations acting as State agents are directly obliged not to violate human rights. This flows from the State's role as the primary duty-bearer under human rights law, and the doctrine of positive obligations. Individual States have their own rules for determining if corporations are State agents at national law, which usually refer to State ownership and control, the exercise of public functions or a combination thereof. The ECtHR relies on a set of criteria to determine State agency, which includes legal status, institutional and operational independence, the nature of the activity, and its context. Despite clarity over States' duties in this area, it is one which has still seen relatively little action in the wake of the GPs.[227]

The State duty to protect and positive obligations also oblige States to ensure that companies they, control, support, do business with, or rely on to provide essential public services, do not abuse human rights. Government support for business can by supplied through bodies such as export credit agencies (ECAs), official investment insurance or guarantee agencies, and State-owned investments, such as sovereign wealth and public pension funds. ECAs are a significant source of official finance and insurance for business activities in developing economies[228]; OECD Guidance on ECAs is contained in the so-called "Common Approaches", which are being aligned with the GPs.[229] Sovereign wealth funds are State-owned funds that can invest in real and financial assets, including stocks, bonds, real estate, or investment vehicles like equity or hedge funds. Often amounting to thousands of billions of dollars, their funds accrue from the export by the State of commodities, or foreign-exchange reserves.[230] While the Norwegian Pension Fund Global was until recently viewed as the vanguard of responsible investment practice amongst sovereign wealth funds, with investments excluded from its portfolio on human rights grounds by an independent ethical council, in 2014 this body was disbanded, a move met with criticism from civil society. [231]

224. For instance, information "impending developments" or where disclosure would be "seriously prejudicial" to a company's commercial position: see proposal, Article 1(3) at page 28 of "Non-financial reporting reform on thin ice", European Coalition for Corporate Justice, http://www.corporatejustice.org/Non-financial-reporting-reform-on.html?lang=en.
225. The European Commission is however mandated under the Directive to publish within two years non-binding guidelines on a methodology for reporting, including general and sector non-financial Key Performance Indicators.
226. European Coalition for Corporate Justice, Why Is the Corporate Reporting Reform Important? (Media briefing, February 26 2014), http://www.corporatejustice.org/IMG/pdf/media_briefing_26-02-2014.pdf.
227. See generally, Camilla Wee, Regulating the Human Rights Impact of State-Owned Enterprises: Tendencies of Corporate Accountability and State Responsibility (International Commission of Jurists, October 2008), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf; and Clifford Chance, State Immunity and State-Owned Enterprises (December 2008), http://business-humanrights.org/sites/default/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF.
228. Karyn Keenan, Export Credit Agencies and the International Law of Human Rights (Halifax Initiative Coalition, January 2008), http://www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf; "Working with SOEs", Human Rights and Business Dilemmas Forum, http://hrbdf.org/dilemmas/working-soe/#.VMXg4NLF89Q
229. 229. OECD Council, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches"), TAD/ECG(2012)5 (28 June 2012), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en. See also Danish Institute for Human Rights, French National Consultative Commission on Human Rights and German Institute for Human Rights, Submission to OECD Consultation between Civil Society Organisations (CSOs) and Members of the OECD's Working Party on Export Credits and Credit Guarantees (ECG) (2013), http://business-humanrights.org/en/pdf-submission-to-oecd-consultation-between-civil-society-organisations-csos-and-members-of-the-oecd%E2%80%99s-working-party-on-export-credits-and-credit-guarantees-ecg
230. "Fund Rankings", SWFI, http://www.swfinstitute.org/fund-rankings/.
231. Emily Woodgate and Nina Berglund, "Critics Attack Oil Fund Changes", News in English: Views and News from Norway, April 4, 2014, http://www.newsinenglish.no/2014/04/04/critics-attack-oil-fund-plans.

6.2.2 Private delivery of public services

The State retains the duty to protect human rights when it privatises or contracts with private actors for the provision of public services.[232] Such services, which can include health and social care, housing, education, immigration services, criminal justice and security services, and public utilities, such as water, energy and transport, frequently touch directly on the human rights of service users.[233] The government or other public bodies must thus provide for adequate service standards; monitoring and accountability mechanisms; adequate human rights due diligence in the context of public-private partnerships and privatisations.

In reality, privatisation of public services has often created the context for abuses, with examples abounding in relation to water[234] and health,[235] in particular, but also with regard to other "core" public functions, such as housing, immigration detention and removals and criminal justice.[236] Gaps in protection arise where, for instance, available remedies for human rights abuses can only review public bodies even though the perpetrator is a private company.

As observed by the UK Parliament's Committee on Human Rights, this entails a heavy onus on public authorities to take appropriate measures to ensure human rights compliance when privatising or "contracting out" services. This includes developing and actively disseminating accessible guidance,[237] producing template contracts, and checklists and other tools for commissioning authorities to address specific service areas. The Scottish Government, with support from the Scottish Human Rights Commission, and the UK Equality and Human Rights Commission, has begun to take steps to meet these needs.

6.2.3 Public procurement

The GPs call for governments to "promote respect by business enterprises with which they conduct commercial transactions." Public procurement, also called public tendering, is the procurement of goods and services on behalf of public authorities. Government spending in procurement of goods and services is a major component of the overall global economy, accounting for an average of 12% of GDP across OECD countries[238] and around one fifth of GDP in the EU.[239] Governments thus wield great influence over respect for and enjoyment of human rights through their procurement of goods and services. This includes their capacity to affect conditions in global supply chains, given

232. According to GP5, "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights." See generally Koon de Feyter et al., Privatisation and Human Rights in the Age of Globalisation (Antwerp: Intersentia, 2005).
233. See, for example, Antenor Hallo de Wolf, Reconciling Privatization with Human Rights (Intersentia, 2012); Antenor Hallo de Wolf, "Human Rights and the Regulation of Privatized Essential Services", Netherlands International Law Review 60, no. 02 (2013), 165–204.
234. "How Privatisation Undermines the Human Right to Water", Public Services International, http://www.world-psi.org/en/how-privatisation-undermines-human-right-water.
235. Northern Ireland Human Rights Commission, In Defence of Dignity: The Human Rights of Older People in Nursing Homes (Belfast: 2012), http://www.nihrc.org/documents/research-and-investigations/older-people/in-defence-of-dignity-investigation-report-March-2012.pdf.
236. "Privatisation", Business & Human Rights Resource Centre, http://business-humanrights.org/privatisation.
237. See, for example, Joint Committee on Human Rights, Any of Our Business? Human Rights and the UK Private Sector: Government Response to the Committee's First Report of Session 2009-10 (Great Britain Parliament, 2010), Vol. 1, HL Paper 5-I, HC64-I, paras. 132–150, and Joint Committee on Human Rights, The Human Rights of Older People in Healthcare (Great Britain Parliament, 2007), HL Paper 156_I, HC 378-I.
238. Note, this figure excludes procurement by state-owned utilities: '40. Size of Public Procurement Market', OECD iLibrary, http://www.oecd-ilibrary.org/sites/gov_glance-2011-en/09/01/index html?contentType=%2fns%2fStatisticalPublication%2c%2fns%2fChapter&itemId=%2fcontent%2fchapter%2fgov_glance-2011-46-en&mimeType=text%2fhtml&containerItemId=%2fcontent%2fserial%2f22214399&accessItemIds.
239. Including procurement by public utilities European Commission Annual Public Procurement Implementation Review, SWD (2012) 342 final (October 9 2012), http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf.

their status as "mega-consumers" and, therefore, their capacity to "make" and sustain markets.[240] Yet, suppliers of goods to governments have been implicated in the use of child labour,[241] forced labour,[242] interference with the right to freedom of association and to form trade unions,[243] and breaches of other workers' rights.[244] In Denmark, as a further example, the purchase of Chinese granite extracted by labourers working under dangerous conditions, and child labour in the supply chain for hospital equipment caught public attention.[245]

Surprisingly, free trade and "fair competition" requirements under international agreements have in the past been perceived as obstructing public authorities' ability to select suppliers who respect human rights over those who do not. The World Trade Organization (WTO) Government Procurement Agreement, for instance, requires a WTO-proof justification of public procurement measures aimed at protecting human rights against abuse in third countries, allowing the EU, for example, to take action against a US State in response to a law it had passed prohibiting government procurement from companies that invested in Myanmar.[246] Historically, doubts were also cast over whether the principles of free movement of goods, services, capital and people within EU boundaries[247] constrained the authority of public bodies in EU Member States to promote equality, "green," or "ethical" considerations through public procurement.[248]

Developments over recent years have however emphasised the constitutional status of human rights within the EU legal order, as well as the role of public purchasing in securing sustainable development. In this context, a new EU public procurement Directive,[249] aims to "increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money…", but also to "Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services." Thus, the new Directive will allow for inclusion of societal, environmental or other characteristics in technical specifications of the tender, contract award criteria, and conditions for contract performance, including obligations concerning sub-contractors, and permits public bodies to exclude companies or their bids on human rights grounds.[250]

240. Robert Stumberg et al., Turning a Blind Eye? Respecting Human Rights in Government Purchasing (The International Corporate Accountability Roundtable (ICAR), September 2014), http://accountabilityroundtable.org/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf.
241. A 2014 audit at Zongtex Garment Manufacturing in Phnom Penh, Cambodia, which makes clothes sold by the US Army and Air Force found nearly two dozen under-age workers, some as young as 15: Ian Urbina, "U.S. Flouts Its Own Advice in Procuring Overseas Clothing", The New York Times, December 22, 2013, http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html.
242. In a pending lawsuit, the families of Nepalese workers allege that they were fraudulently recruited by a U.S. defence subcontractor, transported to Iraq against their will, and kidnapped by Iraqi insurgents while en route to a U.S. military base. The workers' executions were broadcast on Nepali television: Adhikari v. Daoud & Kellogg Brown Root, et al [2013] United States District Court Southern District of Texas No. 09–1237, 1–3.
243. "Vaqueros Navarra Background", Maquila Solidarity Network, http://en.maquilasolidarity.org/node/711.
244. "A defence contractor that makes body armour and tactical gear failed to pay overtime wages at its factory in Tijuana, Mexico", in Bjorn Claeson et al., Subsidizing Sweatshops II: How Our Tax Dollars Can Foster Worker Rights and Economic Recovery rather than Fuel the Race to the Bottom (SweatFree Communities, 2009).
245. DanWatch and Danida, Har Du Husket Gummiet? (2013), http://www.danwatch.dk/sites/default/files/documentation_files/danwatch_2013_-_har_du_husket_gummiet.pdf.
246. World Trade Organization, United States — Measure Affecting Government Procurement, WT/DS88 (14 February 2000). The US legislation in question was later found unconstitutional for other reasons.
247. "EU Internal Market", Europa, http://europa.eu/legislation_summaries/internal_market/index_en.htm.
248. Consistency of "social" preferences with the on public purchasers to select the most "efficient" or "most economically advantageous tender" (MEAT) was questioned: Christopher McCrudden, Buying Social Justice: Equality, Government Procurement, and Legal Change (Oxford: Oxford University Press, 2007), chap. 10–14."source":"Primo","event-place":"Oxford ; New York","ISBN":"0199232423","call-number":"K884","shortTitle":"Buying social justice","language":"eng","author":[{"family":"McCrudden","given":"Christopher"}],"issued":{"date-parts":[["2007"]]},"locator":"10-14","label":"chapter"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}
249. On 15 January 2014 the European Parliament adopted a Directive on public procurement (COM (2011) 896) as part of the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth (see COM (2010) 2020).
250. The Explanatory Memorandum to the Commission's proposed Draft Directive explains that contracting authorities are required reject tenders if their low price is due to non-compliance with EU legislation or international law related to social, labour or environmental standards, or where a business has been convicted of child labour or human trafficking; optional exclusions are allowed where a public purchaser is aware of violations of obligations, by a tenderer, in the areas of social, labour law or environmental law.

6.3 Conflict-affected areas

Businesses operating in conflict-affected areas risk becoming involved in human rights abuses committed, for instance, by security forces, armed non-State actors or de facto governmental authorities. Business activities in conflict and post-conflict zones have increasingly been identified as a factor in causing, prolonging, re-igniting or exacerbating conflicts in many parts of the world, in spite of their potential peace-building role.[251] The GPs call on States to take specific steps in relation to businesses operating in conflict-affected areas. GP7 stipulates that States should assist businesses to avoid being involved in human rights abuses, with special attention to gender-based and sexual violence, while denying public support to any recalcitrant businesses that have been. A number of government-backed initiatives are found in the former area. The Voluntary Principles on Security and Human Rights were the first initiative to attempt to address human rights risks arising from security operations as such.[252] Subsequently, the International Code of Conduct for Private Security Providers has established practice standards for the private security industry as well as an emerging independent accountability mechanism.[253] Less encouragingly, the Kimberley Process, which established a certification scheme for rough diamonds with the aim of eliminating the diamond trade as a source of revenue for paramilitary forces, has become severely criticised with doubts cast on its governance and effectiveness.[254]

6.4 Policy coherence

As discussed, States mostly protect rights-holders against human rights abuses by businesses in the same way they do against abuses by public or other non-State actors: through their general laws, policy and programmes, rather than through dedicated measures with a "human rights" label attached. However, just as they can promote enjoyment of human rights unintentionally, so laws and policies outside the human rights or CSR area can, without meaning to, undermine them. Given the regulatory and institutional complexity of modern States, and the volume of rule-making that goes on bilaterally between States, as well as at regional and international levels, ensuring "coherence" with human rights commitments across all policy areas is a major challenge.

The GPs accordingly call for States to map the impacts they may have on business respect for human rights, via State organs and practices that influence business practices (GP8); agreements concluded with other States or businesses (GP9); and membership of multilateral institutions (GP10). In this context, NAPs and national baseline assessments can be an important tool for promoting both "vertical" coherence, that is, consistency between international human rights obligations, and domestic law, policy and practices, and "horizontal" coherence, in other words, consistency with human rights across functional units of national and sub-national government.

6.4.1 Trade

At a macro level, there have been three prominent narratives historically about trade and human rights. The first has focused on the impacts of the terms of trade[255] on poverty, and poverty reduction, in connection especially with tariff regimes for agricultural produce.[256] The second has concerned the

251. See, for example, Red Flags: Liability Risks for Companies Operating in High-Risk Zones, http://www.redflags.info/, "Economy", International Alert, http://www.international-alert.org/economy , Thorbjørn Waal Lundsgaard, 'Peace for Sale: What Is the Role of Human Rights-Based CSR in the Extractive Industry in Post-Conflict Environments?', Business, Peace and Sustainable Development 2014, no. 3 (June 1, 2014), 73–98.
252. "What Are The Voluntary Principles?", The Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/.
253. International Code of Conduct for Private Security Service Providers, http://www.icoc-psp.org/Home_Page.html.
254. The Kimberley Process (KP), http://www.kimberleyprocess.com/. And James Melik, 'Diamonds: Does the Kimberley Process Work?', BBC, 28 June 2010, http://www.bbc.co.uk/news/10307046.
255. Especially border measures, i.e., quantitative restrictions (quotas, embargoes and licensing) and tariffs.
256. Here, the European Union's Common Agricultural Policy has been a particular target for criticism. See, for example, Mark Curtis, Milking the Poor: How EU Subsidies Hurt Diary Producers in Bangladesh (ActionAid Denmark, 2011), http://www.actionaid.org/sites/files/actionaid/milking_the_poor.pdf.

use of human rights clauses in trade agreements, and whether these really serve to promote human rights, or should rather be viewed as covert protectionism, with ultimately negative effects for human rights in that they stifle developing country exports and depress national and individual incomes. A third theme, that of whether trade liberalisation is leading to a global race to the bottom in terms of labour standards and social protection, is one that has recently been reanimated in connection with the proposed EU-US Transatlantic Trade and Investment Partnership.[257]

The EU has exclusive competence on trade policy, excluding independent action in these areas by Member States. EU common commercial policy must be conducted "in the context of the principles and objectives of the Union's external action", which includes human rights and fundamental freedoms.[258] On this front, the EU applies a Generalised System of Preferences for market access granted to developing countries that apply. "Duty-free" market access is granted on a range of tariff lines to countries designated as "vulnerable", and which are implementing and accept monitoring under international conventions on human rights and labour standards.[259] Serious, systematic human rights violations can lead to temporary withdrawal of preferences, as happened in the past in relation to Myanmar and Sri Lanka.[260]

EU "economic partnership agreements" are concluded bilaterally or with groups of countries. Generally, these have not mainstreamed human rights.[261] Recent bilateral trade agreements, however, contain provisions on sustainable development, which can include human rights. Under the EU-Korea Free Trade Agreement, the parties commit to respecting, promoting and realising ILO Core Labour Standards, and to effectively implementing other ILO Conventions, "to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards".[262] Bilateral agreements, and the GSP, are subject to the WTO Enabling Clause,[263] which requires that any restrictions imposed on trade in pursuit of "public morals" are strictly limited, especially if the object of protection lies outside the borders of the contracting party.[264]

257. "In Focus: Transatlantic Trade and Investment Partnership (TTIP)", European Commission, http://ec.europa.eu/trade/policy/in-focus/ttip/. Jacques Pelkmans et al., EU-US Transatlantic Trade and Investment Partnership: Detailed Appraisal of the European Commission's Impact Assessment (European Parliamentary Research Service, 2014), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/528798/IPOL-JOIN_ET(2014)528798_EN.pdf; John Hilary, The Transatlantic Trade and Investment Partnership: A Charter for Deregulation, an Attack on Jobs, an End to Democracy (War on Want, 2014), http://www.waronwant.org/campaigns/trade-justice/more/inform/18078-what-is-ttip.

258. European Union, The Treaty on the Functioning of the European Union (1958), Article 207. Article 205 of TFEU and Article 3(5) of TFEU provide EU external action shall contribute to human rights, and external action includes common commercial policy and development cooperation. Commercial policy is an area of exclusive EU competence and includes trade agreements in goods: Lorand Bartels, Human Rights Conditionality in the EU's International Agreements (Oxford: Oxford University Press, 2005).

259. The European Parliament and the Council of European Union, Regulation (EU) No 978/2012 of the European Parliament and of the Council (25 October 2012) applying a scheme of generalised tariff preferences and repealing Council Regulation (EC), No 978/2012 (25 October 2012), http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf. The scheme includes Pakistan, Mongolia and Armenia.

260. The Council of the European Union, Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, No 552/97 (24 March 1997), based on labour rights violations; The Commission of the European Communities, Commission Decision of 11 June 2009 amending Decision 2008/938/EC on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for in Council Regulation (EC) No 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, No 454/2009 (11 June 2009); The Council of the European Implementing Regulation (EU) No 143/2010 of the Council of 15 Feb 2010 temporarily withdrawing the special incentive arrangement for SD and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka (15 February 2010).

261. The Cotonou Agreement and many agreements do not contain human rights clauses, and sector trade agreements e.g. on fisheries, steel and textile do not: Lorand Bartels, The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries (the European Parliament's Committee on International Trade, 2008).

262. Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14 May 2011, p.8, Article 1(1), Objectives, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2011:127:TOC.

263. World Trade Organization, Differential and more favourable treatment reciprocity and fuller participation of developing countries, L/4903 (28 November 1979) http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm.

264. Human rights can be addressed via import and export bans on goods harmful to human rights (e.g., conflict diamonds) or a WTO waiver requiring adoption of measures at national level, as used in relation to torture equipment, e.g., Council Regulation (EC) No 1236/2005 gives effect inter alia to the UN Convention Against Torture, prohibiting import and export of goods with no practical purpose other than capital punishment or torture, etc.

Trade agreements, then, can be vehicles for fulfilling the State duty to protect and it should be considered how their processes and content could give better effect to government commitments to the GPs and other relevant frameworks.[265] In this context, a variety of ideas have been ventured, which include proposals for a standard human rights clause to be included in EU Free Trade Agreements,[266] that States should undertake human rights impact assessments of all new trade agreements,[267] and for more extensive monitoring and remediation mechanisms to apply during the implementation phase.[268]

6.4.2 Investment

Recent years have seen a proliferation of bilateral investment treaties (BITs). These primarily protect and encourage FDI, and whilst they require companies to comply with national law, rarely do they refer to respect for human rights.[269] BITs typically also allow enterprises to seek compensation from host States through legally binding arbitration (for example, for discrimination or expropriation), the legitimacy of which, taking place beyond a host State's courts, has increasingly been called into question, with many emerging economies cancelling or renegotiating BITs.[270]

State-investor contracts, made between a host State and a foreign business investor for the development of specific projects, for instance, in the extractive, energy or agricultural sectors, can have significant implications for human rights. Such contracts may stipulate operating standards for a project, for example, in the area of security, or set the terms on which the State can monitor the project's impacts. So-called "stabilisation clauses" in such agreements can "freeze" social and environmental regulation in the host State, inhibiting the progressive realisation of economic and social rights.[271] Yet, both BITs and State-investor agreements can, in principle, be drafted to avoid such outcomes, with new tools and guidance launched towards this goal.[272]

6.4.3 External relations and development assistance

The GPs call on States to mainstream business and human rights in external relations, which naturally includes their membership of international organisations. Some of these, such as the OECD, have already attempted to align their standards with the GPs. Others, most notably the World Bank, but

265. Trade Sustainability Impact Assessments (SIAs) for instance, rely of indicators including Employment, Biodiversity, Environmental Quality, Natural Resource Stocks, Poverty, Equity, Health and Education but lack any explicit human rights focus.
266. The proposed clause would read: "respect for democratic principles and fundamental human rights, as laid down in the [UDHR], and for the principle of the rule of law, underpins the internal and international policies of both parties. Respect for these principles constitutes an essential element of this agreement": Lorand Bartels, "The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries", European Parliament's Committee on International Trade (2008).
267. Olivier De Schutter, Report of the Special Rapporteur on the Right to Food, Addendum: Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5 (Human Rights Council, 19 December 2011), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf.
268. Here, the EU FLEGT scheme could be a model to consider. On a voluntary basis, FLEGT establishes a national licensing scheme for legal timber, with "legality" defined with reference to national law but also social responsibility agreements, cultural norms, health and safety legislation. A new Regulation applying to all non-FLEGT timber imposes due diligence and risk assessment obligations on corporations putting timber into the European market, with fines and sanctions for non-compliance. See The European Community and the Republic of Ghana, Voluntary Partnership Agreement Between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community (2009).
269. Marc Jacob, International Investment Agreements and Human Rights (Duisburg: INEF, Institute for Development and Peace, University of Duisburg-Essen, 2010), http://humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.
270. See, for example, Ben Bland and Shawn Donnan, "Indonesia to terminate more than 60 bilateral investment treaties", Financial Times, 26 March 2014. The EU has exclusive competence on foreign direct investment as part of commercial policy. See The European Union, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007/C 306/01 (13 December 2007).
271. See, for example, Andrea Shemberg, Stabilization Clauses and Human Rights (IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 2009).
272. See, for example, UN Principles for Responsible Contracts by John Ruggie, providing guidance on matters such as operating standards, stabilisation clauses, compliance and monitoring, transparency, and grievance mechanisms for third parties. See also, Nora Götzmann and Mads Holst Jensen, Human Rights and State-Investor Contracts (Copenhagen: Danish Institute for Human Rights, 2014).

also other international financial institutions (IFIs), have not, to loud complaints from human rights defenders and affected communities, given a poor track record.[273] At least at a high level, the EU appears to be taking steps in the right direction: business and human rights is now included in its principal human rights policy instrument,[274] if not yet systematically in its human rights dialogues[275] and regional partnerships.

Recently, the potential role of the private sector an agent and vehicle of international development assistance has been emphasised by a number of national governments in Europe and Asia[276] and by the EU.[277] Since many of the same States have committed to a human rights based approach to development (HRBA),[278] as well as the GPs, there is once again a clear need for "joined-up" policies, to ensure that the implementation of development assistance promotes, and does not undermine human rights, in practice.[279]

7. Working group II: Corporate Responsibility to Respect

The corporate responsibility to respect human rights under Pillar II of the UN Framework requires businesses to avoid infringing human rights and to address adverse human rights impacts they may be involved in. Businesses should thus seek to prevent or mitigate impacts that they have caused or contributed to, as well as those directly linked to their operations, products or services through their business relationships, both contractual and non-contractual (GP13).

International law still does not establish direct human rights duties on non-State actors.[280] Yet, the measures and behaviour required of businesses to fulfil their responsibility to respect human rights can and should be provided for by each State's respective national laws and policies, in all the various areas these touch on business activities, from labour, environmental, non-discrimination and product safety standards, to those in the areas of intellectual property, privacy, financial sector and essential services regulation. In many jurisdictions, businesses do, to a large extent, already respect human rights, via this route of compliance with existing legal rules. Yet, this mechanism can be an unreliable one: it may assume too much, in terms of the ability, or will, of governments and subordinate public

273. See, for example, Human Rights Watch, Abuse-free development: How the World Bank should safeguard against human rights violations (2013), http://www.hrw.org/news/2013/07/22/world-bank-ducking-human-rights-issues.
274. The EU's Strategic Framework and Action plan on Human Rights addresses business and human rights, and undertakes to promote human rights in all areas of EU external action, in particular, "trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy…". See Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12 (25 June 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf. A joint EU-African Union workshop on "Fostering the implementation of the UN Guiding Principles on Business and Human Rights through regional cooperation" was held in September 2014, which could serve as inspiration for Europe-Asia cooperation in future.
275. The European Union, EU guidelines on human rights dialogues with third countries (2008), http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf.
276. Australia, for example, recently merged AusAid with its Department of Foreign Affairs and Trade. See Brian Doolan, "AusAID into DFAT: opportunity not threat", Devpolicy, 14 October 2013, http://devpolicy.org/ausaid-into-dfat-opportunity-not-threat-20131014/.
277. The EU's 2011 Agenda for Change identifies the private sector as a "main partner" in EU development cooperation, and in 2014 the EU launched a specific policy to promote the role of the private sector in development: European Commission, A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries, COM(2014) 263 final (13 May 2014), http://www.cosv.org/wp-content/uploads/2014/08/psd-communication-2014_en1.pdf. The latter registers the need to promote responsible business practices and HRBA throughout EU development cooperation, and indicates the expectation that EU-based companies adhere to global responsible business standards, such as the UNGC, GPs, ILO Tripartite Declaration and OECD Guidelines for MNEs.
278. Stamford Interagency Workshop on a Human Rights-Based approach in the Context of UN Reform, Statement on a Common Understanding of a Human Rights-Based Approach to Development Cooperation (Stamford: United Nations, 2003).
279. "European Commission Risks Putting Business Profits before the Needs of the World's Poorest", Oxfam International, http://www.oxfam.org/en/eu/pressroom/reactions/european-commission-risks-putting-business-profits-needs-world-poorest. See further section 4.4.
280. See further Section I and Working Group I above and Working Group III below. Note, though, companies are subject to limited direct obligations under, for instance, international environmental law, and may also be subject to duties under international humanitarian and international criminal law in certain circumstances.

authorities to regulate business conduct in line with human rights requirements — a tendency which, arguably, has been exacerbated by pressure on States to relax regulatory regimes in the context of liberalisation and a resulting competition between States for FDI.

Such was the backdrop to the governance "gaps" accompanying globalisation highlighted by the SRSG when launching the UN Framework and, accordingly, the GPs asserted the corporate responsibility to respect human rights as a free-standing, universally-applicable minimum standard of business conduct, driven by global social expectation while at the same time based on international law. Though sometimes criticised for being a legal "fudge", seen in this setting, the hybrid status of the corporate responsibility to respect can perhaps be understood as a necessary compromise. The corporate responsibility to respect recognises the enduring role of States as de jure duty bearer for human rights, on one hand, but on the other, the ethically unacceptable limitations imposed by the still State-centric structure of international law.

7.1 Human rights due diligence

The GPs afford a central role to human rights due diligence, a process said to enable any corporation to achieve full respect for all human rights. A business' first step, in undertaking due diligence, should be to have a published policy commitment to respect human rights (GP15). Thereafter, due diligence is envisaged to comprise four steps, taking the form of a typical continuous improvement cycle (GPs 17–20):

1. Assessing actual and potential impacts of business activities on human rights — human rights risk and impact assessment;

2. Acting on the findings of this assessment, including by integrating appropriate measures to address impacts into company policies and practices;

3. Tracking how effective the measures the company has taken are in preventing or mitigating adverse human rights impacts; and

4. Communicating publicly about the due diligence process and its results.

Companies should also take steps to remediate any adverse impacts of their activities on rights-holders (GP22; see further Working Group III below).

This process is said to be adaptable to the specific character and context of any enterprise: companies are to adjust the scale and complexity of the measures to meet the responsibility to respect human rights depending on factors including size, industry sector, and the seriousness of human rights impacts to which the company's activities can give rise (GP14).

Also, since the corporate responsibility to respect human rights refers to all internationally-recognised human rights, not just those in force in any one particular jurisdiction (GP11), in terms of scope, human rights due diligence should encompass, at minimum, all human rights enumerated in the International Bill of Human Rights, the labour standards contained in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and, based on its specific circumstances, additional standards, such as those relating to indigenous peoples[281] or conflict-affected areas (GP12).

281. International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries, No 169 (27 Jun 1989). United Nations, Declaration on the Rights of Indigenous Peoples, A/61/L.67 and Add.1 (13 September 2007).

7.2 Human rights policies

While it is by no means a foregone conclusion that paper promises are turned into reality, at the same time, without an explicit written commitment, systemic change within a business towards respect for human rights is highly unlikely. At a minimum, a human rights policy should help to raise company awareness of the need to consider human rights impacts, and serve as an entry point for dialogue for stakeholders such as workers or communities. According to the GPs, a high-level company policy statement expressing company commitment to respect human rights is essential: only Board-level buy-in will give a policy the authority needed to permit proper implementation, especially in face of any conflict with any conflicting business imperatives. A company's human rights policy should furthermore be public, so that external stakeholders have a proper platform for engagement with, and scrutiny of, companies affecting them (GP16).

Establishing the state of play in terms of business practice in this area can be hard. A paper published by the SRSG in 2006 found that, amongst a (non-representative) sample of Fortune 500 companies, where respondents were mainly based in the US and Europe, 90% reported having an explicit set of principles or management practices in place with regard to human rights.[282] A survey of 153 companies of all sizes and from 39 countries undertaken by the UNWG in 2013 (again based on a non-random sample) found 58% with a public statement on human rights.[283] But the Business and Human Rights Resource Centre, which has recently begun to document published company policies on human rights, currently lists just over 350 worldwide.[284] Matters are further complicated given that companies participating in the UN Global Compact or stating support for the OECD Guidelines for MNEs are also now implicitly committed to respect for human rights. Nonetheless, a 2013 study for the European Commission, assessing 200 randomly selected, large European companies, found that only 33% referred to the UN Global Compact, OECD Guidelines or ISO 26000, only 3% to the GPs themselves, and 2% to the ILO MNE Declaration.[285]

Unsurprisingly, the same study found that very large companies (those with over 10,000 employees) were more likely to refer to international standards in CSR policies than smaller companies. It also detected significant variation between surveyed countries in the likelihood that companies have a human rights policy — suggesting that national factors, including government encouragement or support, can influence outcomes in this area. From the viewpoint of "early adopters" of human rights policies, government steps to promote their adoption by the rest would help to level the playing field, so that it should be a business-friendly initiative.[286] On the basis of available data, it seems clear that more needs to be done by both government and business itself to improve performance in this area.

282. John Gerard Ruggie, "Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey", Corporate Social Responsibility Initiative, Working Paper, no. 28 (2006), http://www.humanrights.ch/upload/pdf/070706_Ruggie-survey-Fortune-Global-500.pdf.
283. Human Rights Council, Addendum: Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and corporations, A/HRC/23/32/Add.2 (16 April 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-32-Add2_en.pdf.
284. The list does not include company policies referring only to employees or suppliers. See "Company Policy Statements on Human Rights", Business & Human Rights Resource Centre, http://business-humanrights.org/en/company-policy-statements-on-human-rights.
285. Caroline Schimanski, An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles.
286. Danish Institute for Human Rights, International Corporate Accountability Roundtable, and Global Business Initiative on Human Rights, Business Dialogue on National Action Plans: Report of Key Themes (London: 2014), http://accountabilityroundtable.org/wp-content/uploads/2014/05/Business-Dialogue-ICAR-DIHR-GBI-Key-Themes.pdf.

7.3 Human rights impact assessment

Human rights impact assessment (HRIA) is the first step in a due diligence process.[287] An adverse human rights impact may be said to occur when an action removes or reduces the ability of an individual to enjoy his or her human rights. Companies can be connected to adverse human rights impacts in a number of distinct ways. They are potentially responsible for:

- Causing a human rights impact through intended or unintended actions, for example, deliberate discrimination in hiring practices, or accidental pollution of a local waterway, interfering with the right to health;
- Contributing to a human rights impact, by being one of a number of entities whose conduct together curtails human rights, for instance, where a global brand changes its order specifications at short notice so that its suppliers breach labour standards in meeting them; and
- Impacts directly linked to a business' operations, products or services: a company may be connected to human rights abuses through its business relationships, including those with suppliers, joint-venture partners, direct customers, franchisees and licensees.[288]

The GPs further indicate that companies should, in the course of performing an HRIA, draw on internal or independent human rights expertise; undertake meaningful consultation with potentially affected rights-holders and other relevant stakeholders; consider human rights impacts on individuals from groups that may be at heightened risk of vulnerability or marginalisation, and gender issues; and repeat risk and impact identification at regular intervals, for instance, before entering into a new activity, prior to significant decisions about changes in activities, and periodically throughout the project lifecycle (GP18).

Yet, the GPs' guidance on HRIA remains high-level, without detailed descriptions of an HRIA process or orientation on how HRIA should be adapted to particular industries or contexts. Various initiatives are now attempting to address this, with guidance recently issued, for example, on HRIA for particular sectors,[289] and for thematic HRIAs, for instance, focusing on the rights of children[290] and indigenous people.[291] Some individual companies have devised methodologies for impact assessment in connection with specific issues arising in their own operating environments.[292] So far, only a small handful of HRIAs undertaken by companies have been published,[293] with most

287. For an overview, see Désirée Abrahams and Yann Wyss, Guide to Human Rights Impact Assessment and Management (HRIAM) (International Finance Corporation, International Business Leaders Forum and the UN Global Compact, 2010), http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES. See also 'Human Rights Impact Assessment Tools', NomoGaia, http://nomogaia.org/tools/.

288. See further Margaret Wachenfeld and Mark Hodge, State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships (Institute for Human Rights and Business and Global Business Initiative on Human Rights, 2012), http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf.

289. See, for example, International Council on Mining & Metals, Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes (2012), http://www.icmm.com/page/75929/integrating-human-rights-due-diligence-into-corporate-risk-management-processes, and IPIECA and the Danish Institute for Human Rights, Integrating human rights into environmental, social and health impact assessments. A Practical Guide for the oil and gas industry (2013), http://www.humanrights.dk/files/media/dokumenter/tools/integrating_hr_into_eshia.pdf.

290. UNICEF and the Danish Institute for Human Rights, Children's Rights in Impact Assessments: A guide for integrating children's rights into impact assessments and taking action for children (2013), http://www.unicef.org/csr/css/Children_s_Rights_in_Impact_Assessments_Web_161213.pdf.

291. See, for example, Johannes Rohr and José Aylwin, Interpreting the UN Guiding Principles for Indigenous Peoples (Berlin: IWGIA, 2014), http://www.iwgia.org/iwgia_files_publications_files/0684_IGIA_report_16_FINAL_eb.pdf; and IBIS, Guidelines for Implementing the Right of Indigenous Peoples to Free, Prior and Informed Consent (2013),http://www.socialimpactassessment.com/documents/Guidelines_Implementing_rights_Indigenous_Peoples_FPIC.pdf.

292. See, for example, Coca-Cola Company, Human Rights Due Diligence Checklists Background and Guidance (2011), http://assets.coca-colacompany.com/7d/59/b2a85d9344bdb7da350b81bcd364/human-rights-self-assessment-checklists.7.14.pdf.

293. See, for example, Nestlé and the Danish Institute for Human Rights, Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in Its Business Activities (2013), http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf, and On Common Ground Consultants Inc., Human Rights Assessment of Goldcorp's Marline Mine (Vancouver: 2010), http://www.hria-guatemala.com/en/MarlinHumanRights.htm.

meeting criticism from civil society stakeholders inter alia for the methodology adopted. Thus, civil society organisations and NHRIs are also undertaking HRIAs,[294] which typically go beyond current corporate practice, for instance, in terms of involvement of rights-holders and transparency.[295]

Thus, the parameters and process of HRIA under the GPs remain emergent and rather contested. One question attracting continuing interest is whether HRIA should be integrated into environmental or social impact assessment processes, particularly where these are provided for by statute or licensing regulations, or undertaken as a separate, "stand-alone" exercise. Another relates to the issues of independence, and equality of arms, in the conduct of impact assessments, and how to achieve this given power asymmetries between companies and communities, which may taint assessments facilitated by company personnel, but also where legislation provides for community consultation to be undertaken by public bodies, who themselves may be, or perceived to be, interested parties in the outcome of an HRIA.[296] Still further questions relate to the potential future role of strategic or sector-wide HRIA, mirroring environmental practice[297]; the role in HRIAs of human rights indicators; and the value of risk-based approaches[298] and of the notion of "impact" assessment itself.[299]

7.4 Responding to human rights impacts and remediation

Once an assessment is completed, the GPs call for businesses to respond to its findings, to prevent human rights abuses and address any that may have been uncovered. Clearly, such responses will be wide-ranging. Internally, a company might need to amend recruitment processes or contractual terms for employees, change its purchasing, sales or marketing practices, improve worker accommodation, introduce due diligence for land acquisitions, and so on. In addition, ensuring the effectiveness of any such changes will usually require the allocation of new resources, for instance, for training and awareness-raising, monitoring and management of human rights impacts on a continuous basis.[300] Businesses are expected to address all their impacts, though they may prioritise their actions. Here, the GPs recommend that companies first seek to prevent and mitigate their severest impacts, or those where a delay in response would make consequences irremediable (GP24).

Where risks or impacts derive from a company's business relationships, rather than from its own activities, the GPs require it to consider what leverage it has over the entity in question; how crucial the relationship is; the severity of the abuse; and whether terminating the relationship would itself have adverse human rights consequences. According to the GPs, "leverage" is a company's ability to effect change in the wrongful practices of an entity, be that an element within the company itself, another business, or a public actor. Modalities of leverage are thus numerous, ranging from communications emphasising human rights by top managers to subordinate units to capacity building and amending contract terms for suppliers.[301] If a business has leverage, it is expected to exercise it. This will be so where impacts are caused by elements within the business itself, in which case it should cease or

294. See, for example, Brigitte Hamm, Anne Schax, and Christian Scheper, Human rights impact assessment of the Tampakan Copper-Gold Project, Mindanao, Philippines (MISEREOR and Fastenopfer, 2013) http://www.misereor.org/fileadmin/redaktion/HRIA_Human_Rights_Impact_Assessment_Tampakan_Copper-Gold_Project_August2013.pdf.
295. Rights and Democracy, Getting it Right: Human Rights Impact Assessment Guide, http://hria.equalit.ie/en/ ; 'Community-Based Human Rights Impact Assessments', FIDH, http://www.fidh.org/en/globalisation-human-rights/business-and-human-rights/7502-community-based-human-rights-impact-assessments.
296. Almut Schilling-Vacaflor, "Democratizing Resource Governance Through Prior Consultations? Lessons from Bolivia's Hydrocarbon Sector", GIGA Working Paper No.184 (2012), http://www.giga-hamburg.de/en/system/files/publications/wp184_schilling.pdf
297. "Sector-Wide Impact Assessments (SWIA)", Myanmar Centre for Responsible Business, http://www.myanmar-responsiblebusiness.org/news/sector-wide-impact-assessments.html.
298. Mark B. Taylor et al, "Due Diligence for Human Rights: A Risk-Based Approach", Corporate Social (2009) http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf.
299. Richard Boele and Christine Crispin, "Should we take the 'impact' out of impact assessment?", Paper presented at IAIA12 (2012), http://www.iaia.org/conferences/iaia12/Final_Non_Review.aspx.
300. See, for example, "Monitoring and Remediation", Gap Inc. Social & Environmental Responsibility Report 2011|2012, http://www.gapinc.com/content/csr/html/human-rights/monitoring-and-remediation.html, and "Human Rights", Nestlé Global, http://www.nestle.com/csv/human-rights-compliance/human-rights.
301. Shift, Using Leverage in Business Relationships to Reduce Human Rights Risks (New York; 2013), http://shiftproject.org/sites/default/files/Using%20Leverage%20in%20Business%20Relationships%20to%20Reduce%20Human%20Rights%20Risks.pdf.

prevent the impact, and provide for, or collaborate in, remediation. Where a company has contributed to or is directly linked to impacts, it should cease and prevent its contribution, exercise leverage, if it has it, and provide, or cooperate in, remediation. If, on the other hand, the company lacks leverage, it is expected to seek ways to increase it, for example, by offering incentives, or applying sanctions to the relevant entity, or collaborating with others to influence its behaviour.[302]

While the GPs' concept of leverage appears straightforward, views often differ about its application in practice. With regard to the financial sector, banks have tended to emphasise constraints on their leverage over those they lend to,[303] while outsiders argue that, as controllers of access to credit, they wield much greater influence,[304] and point to opportunities to piggy-back human rights screening on anti-corruption due diligence obligations that are already established in many jurisdictions.[305] Another area of concern is that of companies' leverage over the use of their products by customers,[306] especially with regard to policing and military supplies, information technology and surveillance equipment,[307] and dual use technologies. Though the export of such products may be permissible under national standards, the GPs require companies to look beyond technical legality in order to ascertain whether, in reality, their products or services facilitate human rights abuses.[308] More complex still is the question of the responsibility and leverage of internet service providers and social media platforms to prevent their use as a medium for propaganda and the organisation of criminal acts, especially given the need, on the other hand, to ensure any restrictions on free speech are lawful, rational and proportionate.[309]

7.5 Supply chain responsibility

Since large corporations usually have the resources on paper to prevent or remediate impacts in line with GPs, for many, the widespread persistence of abuses questions whether they have the will to do so.[310] Yet chronic abuses may be indicative of the existence of genuine dilemmas about how to implement and control standards throughout value chains. For some companies, the production

302. John Gerard Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework, Guiding Principle 19. Cf. Stepan Wood, "The Case for Leverage-Based Corporate Human Rights Responsibility", Business Ethics Quarterly 22, no. 1 (2011), 63–98.
303. The Thun Group of Banks, UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21 (2013), http://business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf.
304. BankTrack and The Berne Declaration, BankTrack on the Thun Group Paper on Banks and Human Rights (December 2013); Ariel Meyerstein, 'Are Big Banks Short-Selling Their Leverage over Human Rights?', The Guardian, October 31, 2013, http://www.theguardian.com/sustainable-business/banks-short-selling-leverage-human-rights.
305. See, for example, "Human Rights Guidance Tool for the Financial Sector", UNEP Finance Initiative, http://www.unepfi.org/humanrightstoolkit/; "About", Finance Against Trafficking, http://financeagainsttrafficking.org/.
306. See e.g. CSRD et al vs Andritz AG [2014] OECD Watch, http://oecdwatch.org/cases/Case_326.
307. "German Companies Are Selling Unlicensed Surveillance Technologies to Human Rights Violators — and Making Millions", Global Voices Advocacy, http://advocacy.globalvoicesonline.org/2014/09/05/exclusive-german-companies-are-selling-unlicensed-surveillance-technologies-to-human-rights-violators-and-making-millions/.Ben Wagner, Exporting Censorship and Surveillance Technology (Humanist Institute for Co-operation with Developing Countries (Hivos), 2012), https://www.hivos.org/sites/default/files/exporting_censorship_and_surveillance_technology_by_ben_wagner.pdf; Cindy Cohn, Trevor Timm, and Jillian York, Human Rights and Technology Sales: How Corporations Can Avoid Assisting Repressive Regimes (Electronic Frontier Foundation [EFF], 2012), https://www.eff.org/files/filenode/human-rights-technology-sales.pdf; Dual Use Items: Big Business Profits Put before Human Rights, 2014, https://www.youtube.com/watch?v=s21JCGcdDX8; Carola Frediani, "A Global Campaign to Monitor the 'Digital Weapons' Trade", TechPresident, 8 April 2014, http://techpresident.com/news/wegov/24901/curtailing-international-surveillance-tech-trade.
308. Francesca Marotta, Request from the Chair of the OECD Working Party on the Responsible Business Conduct (United Nations Human Rights Office of the High Commissioner, 27 November 2013), http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf.
309. Loek Essers, "Google, Facebook to Discuss Online Extremism at Dinner with EU Officials", PCWorld, 8 October, 2014, http://www.pcworld.com/article/2813132/google-facebook-to-discuss-online-extremism-at-dinner-with-eu-officials.html. See also Council of Europe, ICANN's procedures and policies in light of human rights, fundamental freedoms and democratic values, DG2014/12, and other materials available at "Internet governance", Council of Europe, http://www.coe.int/t/informationsociety/icann-and-human-rights.asp.
310. See, for example, "Indonesian Wage Trial: Human Rights Violations 'Systemic'", Clean Clothes Campaign, http://www.cleanclothes.org/news/2014/06/24/indonesian-wage-trial-human-rights-violations-systemic; Janell Ross, "Major American Brands Silent on Alleged Rights Abuses At Overseas Factories", Huffington Post, 21 July 2011, http://www.huffingtonpost.com/2011/07/21/american-brands-abuses-factories-jordan-labor-conditions_n_903995.html.

process may be relatively static and concentrated[311] but for others their contractual networks are as dynamic as they are vast, while commodities can present their own distinct challenges in terms of traceability.[312]

Supplier codes of conduct ranked amongst the earliest business and human rights initiatives and pre-date the GPs.[313] While uptake of this model by consumer-facing companies was relatively rapid in some sectors, strong critiques of practice also quickly emerged, for instance, with regard to reliance by third-party auditors on a superficial checklist approach, on one hand, and for lack of coordination amongst purchasers leading to "audit-fatigue" amongst inspected businesses, on the other.[314] Subsequent innovation has aimed to address these problems with, for example, the launch of virtual data-sharing platforms[315] and an increasing emphasis on capacity strengthening measures for suppliers along with other stakeholders.[316]

Yet egregious abuses continue. In 2013, over 1,000 mainly female garment workers were killed and more than 2,500 injured in the Savar building collapse. Various factors contributed to the "Rana Plaza" disaster, amongst them breaches of construction, health and safety regulations and labour standards by local suppliers based in the factory, who were suppliers to large numbers of well-known European and American brands, and defective inspection arrangements and social audits, on the part of purchasers, that failed to pick them up.

These problems, as well as a broader context of exploitation and marginalisation of female garment workers in Bangladesh, were widely documented[317] and had contributed to earlier workplace disasters.[318] The Rana Plaza catastrophe, because of its horrendous scale, attracted unprecedented public attention and outrage, and triggered a significant multi-actor mobilisation. Brands were convened by the ILO[319] and global unions to coordinate an arrangement for the payment of compensation to workers. In May 2013, within a few weeks of the tragedy, brands and retailers entered into a five-year binding agreement with Bangladeshi and global trade unions. The Accord on Fire and Building Safety in Bangladesh commits more than 150 companies to collaborative efforts to ensure safety in almost half of the country's garment factories, through measures such as independent inspections by trained fire and building safety experts, public reporting, mandatory repairs and renovations to be financed by brands, a central role for workers and unions in both oversight and implementation, supplier contracts with sufficient financing and adequate pricing and worker training.[320] Other international organisations have sought to support these efforts.[321]

311. Many companies rely extensively on single suppliers, for example, Apple/Foxconn: Connie Guglielmo, "Apple's Supplier Labor Practices In China Scrutinized After Foxconn, Pegatron Reviews", Forbes, 12 December 2013, http://www.forbes.com/sites/connieguglielmo/2013/12/12/apples-labor-practices-in-china-scrutinized-after-foxconn-pegatron-reviewed/.
312. United Nations Global Compact and BSR, A Guide to Traceability: A Practical Approach to Advance Sustainability in Global Supply Chains (2014), https://www.unglobalcompact.org/docs/issues_doc/supply_chain/Traceability/Guide_to_Traceability.pdf.
313. For example, the Ethical Trading Initiative, the Fair Labour Association, Worldwide Responsible Apparel Production Program (WRAP) and Social Accountability International (SAI) were launched before the GPs: see further Working Group IV.
314. Jeremy Prepscius, "Building Sustainable Supply Chains", The Guardian, 6 August 2012, http://www.theguardian.com/sustainable-business/blog/building-sustainable-supply-chains.
315. "Sedex Global partners with World Bank Institute to develop Open Supply Chain Platform", Sedex, 12 May 2014, http://www.sedexglobal.com/world-bank-institute-partners-with-sedex-global-to-develop-open-supply-chain-platform/.
316. See, for example, cases in Shift, From Audit to Innovation: Advancing Human Rights in Global Supply Chains (New York: 2013), http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains_0.pdf.
317. Khorshed Alam and Laia Blanch, Stitched Up: Women Workers in the Bangladeshi Garment Sector (War on Want, 2011), http://www.waronwant.org/attachments/Stitched%20Up.pdf.
318. Liana Foxvog et al., Still Waiting — Six Months after History's Deadliest Apparel Industry Disaster, Workers Continue to Fight for Reparations (Clean Clothes Campaign and International Labor Rights Forum (ILRF), 2013); Syeda Sharmin Absar, "Women Garment Workers in Bangladesh", Economic and Political Weekly 37, no. 29 (July 20, 2002), 3012–16.
319. International Labour Organization, The International Labour Organization Response to the Rana Plaza Tragedy (2013), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/article/wcms_241219.pdf.
320. The Bangladesh Accord on Fire and Building Safety, http://bangladeshaccord.org/; Foxvog et al., Still Waiting — Six Months after History's Deadliest Apparel Industry Disaster, Workers Continue to Fight for Reparations, 29.
321. National Contact Points for the OECD Guidelines on Multinational Enterprises, One Year after Rana Plaza (Organisation for Economic Co-operation and Development (OECD), 25 June 2014), http://mneguidelines.oecd.org/NCP-statement-one-year-after-Rana-Plaza.pdf. A further initiative led by US purchasers is the Alliance for Bangladesh Worker Safety, see "About the Alliance for Bangladesh Worker Safety", Alliance for Bangladesh Worker Safety, http://www.bangladeshworkersafety.org/about/about-the-alliance.

Yet, various companies have refused to sign the accord, opting for non-binding commitments to improved factory safety. Moreover, the Rana Plaza Donor's Trust Fund, set up under the accord has still received only half the US$40 million needed to compensate workers or their families, while only half the companies associated with factories in the collapsed building have contributed to the fund at all.[322]

7.6 Transparency and corporate reporting

With the rise of ethical investment, and increasing recognition of the materiality of social and sustainability issues, in terms of investment risk,[323] corporate sustainability reporting, as a device by which companies can be held accountable to markets, has become increasingly prominent, to the extent that some would suggest there has been a "disclosure revolution".[324] In line with this trend, the final step called for by the GPs' due diligence process is for businesses to "communicate" on how they are addressing their human rights impacts.[325] This may be done in a variety of ways, including formal and informal public reporting, in-person meetings, online dialogues, and consultations with affected rights-holders. Information provided should be: (i) published in a format, and with a frequency, matching the scope and severity of impacts, and should be accessible to intended audiences, for example, company communications should be in relevant languages, address any issues of literacy amongst impacted rights-holders and be accessible even to remote communities affected by their activities; (ii) sufficient to permit evaluation of the adequacy of company responses to any specific impact; (iii) designed not to pose risks to rights-holders or others such as human rights defenders, journalists, local public officials or company personnel, or to breach legitimate commercial confidentiality requirements. Businesses whose operations or operating contexts pose risks of severe human rights impacts are expected to report formally (GP21).

Measures taken by States and, in the European case, regionally, to encourage or require corporate reporting on human rights and supply chain transparency have been discussed above (Section 6.1). Many such measures are too new to permit a review of their influence upon business practice. Voluntary frameworks and guidance on corporate sustainability reporting, discussed next, have existed for much longer, and companies are in any case likely to use these to produce sustainability reports, whether voluntarily or as a result of new legal requirements.

The Global Reporting Initiative (GRI) is an international not-for-profit organisation. It has developed, within a multi-stakeholder process, a comprehensive Sustainability Reporting Framework, comprising Reporting Guidelines, Sector Guidance and other resources that provides "metrics and methods for measuring and reporting sustainability-related impacts and performance".[326] The GRI ranks as the "first-mover" of sustainability reporting and is widely used: European enterprises using the GRI Framework to produce sustainability reports rose from 270 in 2006 to over 850 in 2011.

The GRI has provided basic guidance on reporting on human rights from 2006.[327] A 2009 survey of corporate reports undertaken for the GRI and the UNGC (which requires participants to include human rights within the scope of the annual Communication on Progress[328]) identified some creative approaches by companies to human rights reporting, but concluded that, overall, corporate human

322. "Who Needs to Pay Up?", Clean Clothes Campaign, http://www.cleanclothes.org/ranaplaza/who-needs-to-pay-up.
323. Margaret Wachenfeld, Investing the Rights Way: A Guide for Investors on Business and Human Rights (Institute for Human Rights and Business, 2013), http://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf.
324. Paul Hohnen, "The Future of Sustainability Reporting", EEDP Programme Paper 2012/02 (2012), http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/0112pp_hohnen.pdf.
325. John Gerard Ruggie, Addendum: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative — Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/17/31/Add.2 (23 May 2011), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf.
326. "An Overview of GRI", Global Reporting Initiative, https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx.
327. Global Reporting Initiative, Sustainability Reporting Guidelines (2011), 32, https://www.globalreporting.org/resourcelibrary/G3-Guidelines-Incl-Technical-Protocol.pdf.
328. "What Is a COP?", United Nations Global Compact, https://www.unglobalcompact.org/COP/index.html.

rights reporting was weak with regard to the criteria of balanced reporting (that is, presentation of both positive and negative aspects of an issue), completeness, and inclusion of the most relevant issues.[329]

Subsequently, GRI's standard for human rights reporting has been expanded, in line with the GPs. Under this, a company is now expected to report on: (i) material issues, namely, those relevant to the human rights impacts of the company or operation, considering its sector and location; (ii) human rights due diligence, that is, the company's human rights policy, assessment process; allocation of responsibilities for human rights within the organisation; (iii) measures to promote human rights awareness, such as training; (iv) monitoring of impacts of company activities; and (v) company measures to follow-up and remediate any human rights impacts detected.

In addition, the framework includes a wide set of performance indicators that allow the effectiveness of a company's human rights due diligence processes and remediation to be measured.[330] Human rights risks are further integrated into GRI's 10 Sector Supplements — versions of the general reporting framework tailored to specific industry sectors, such as airport operators, mining and metals, media, event organisers, electrical utilities and also NGOs.[331] UNICEF has issued guidance on how to integrate child rights into reporting under the GRI Framework.[332] Along with the International Federation of Accountants, the GRI participates in the International Integrated Reporting Council, which aims to establish an internationally accepted, unitary framework for integrated financial and sustainability reporting.[333]

Doubts are voiced about the value of current reporting practice as an accountability mechanism in relation to human rights. It is often thought that the businesses that most need to report on human rights, i.e., those with negative impacts, may be reluctant to do so, given commercial sensitivities, potential legal liability, and the likelihood of reputational damage.[334] If the development of universal human rights indicators is seen by some as crucial for comparability across company reports, the potential for irrelevance, perverse outcomes and selectivity is emphasised by others.[335] Equally, while civil society actors are at the forefront of calls for mandatory sustainability reporting requirements, they frequently criticise published reports as instruments for "green-" or "blue-washing", the presentation of an unduly favourable image of company impacts on people and the environment, following from a selective approach to what information is communicated.[336] One solution to this dilemma may be independent assurance of corporate sustainability reports. The GPs maintain, "independent verification of human rights reporting can strengthen its content and credibility".[337]

329. Elizabeth Umlas, Corporate Human Rights Reporting: An Analysis of Current Trends (Global Reporting Initiative, The UN Global Compact, and Realizing Rights, 2009), https://www.globalreporting.org/resourcelibrary/Human_Rights_analysis_trends.pdf.
330. Global Reporting Initiative, Sustainability Reporting Guidelines (2011), 32; and Global Reporting Initiative, G4 Sustainability Reporting Guidelines (2013), 70, https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf.
331. "G3 / G3.1 Sector Supplements", Global Reporting Initiative, https://www.globalreporting.org/reporting/sector-guidance/sector-guidance/Pages/default.aspx.
332. Catherine Rutgers (ed.), Children's Rights in Sustainability Reporting: A Guide for Incorporating Children's Rights into GRI-Based Reporting (Geneva: United Nations Children's Fund, 2014), http://www.unicef.org/csr/css/Childrens_Rights_in_Reporting_Second_Edition_HR.pdf.
333. "Integrated Reporting", The IIRC, http://www.theiirc.org/.
334. Cf. Christopher Marquis and Michael W. Toffel, "Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing", Harvard Business School Organizational Behavior Unit Working Paper, no. 11–115 (2014), http://www.hbs.edu/faculty/Publication%20Files/11-115_eb3f204e-3a5f-4a8d-a471-35ce66adc1a7.pdf.
335. See, for example, Damiano de Felice, "Challenges and Opportunities in the Production of Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect", Human Rights Quarterly 37, no. 2 (2015), http://papers.ssrn.com/abstract=2423305.
336. Rina Horiuchi et al., Understanding and Preventing Greenwash: A Business Guide (BSR and Futerra, 2009), http://www.bsr.org/reports/Understanding_Preventing_Greenwash.pdf.
337. Global Reporting Initiative, The External Assurance of Sustainability Reporting (2013), https://www.globalreporting.org/resourcelibrary/GRI-Assurance.pdf. See also "Human Rights Reporting and Assurance Frameworks Initiative - RAFI", Shift Project, http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi.

But the quality and reliability of assurance has also been impugned.[338] Ultimately, in this complex area, it seems likely that a more potent mixture of mandatory disclosure rules, credible independent assurance, and continuing, enhanced investor and civil society scrutiny of company information will be needed if reporting's potential as a lever to improve corporate sustainability and business respect for human rights is to be delivered.

8. Working group III: Access to remedies

8.1 Defining access to remedies in the context of business and human rights

Access to effective remedy for any violation of human rights is established under international law.[339] States have the duty to afford remedies that are capable of leading to a prompt, thorough and impartial investigation; cessation of violations; and adequate reparation, including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. Where abusive activity is ongoing, states should ensure interim measures to prevent irreparable harm. Victims have a right to a truthful account of the facts and circumstances surrounding human rights violations and unless it causes further harm to the victim, public access and transparency to this information should be guaranteed.

Victims therefore must be availed of the means of halting business activities that are harmful to their human rights and claiming effective remedy for damage done. Access to remedies is primarily addressed under GPs 25 to 31, albeit its substance is signposted earlier on, i.e., GP1 establishes a state duty to take appropriate steps to prevent, investigate, punish and redress abuses, recognising that without such measures, "... the State duty to protect can be rendered weak or even meaningless."[340] GP13 states the necessity for businesses to remediate adverse human rights impacts, and GP20 provides that where a company is responsible for adverse impacts, it should provide for or cooperate in their remediation through legitimate processes. GP25 reaffirms the state duty to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related abuses occur within their territory and/or jurisdiction that those affected have access to effective remedy.

The GPs rely on the notion of "grievance", defined as "a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities".[341] On this basis, a grievance may arise before an actual human rights abuse does. A "grievance mechanism" is "any routinised, State-based or non-state-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought." [342]

338. Alberto Fonseca, "How Credible Are Mining Corporations' Sustainability Reports? A Critical Analysis of External Assurance under the Requirements of the International Council on Mining and Metals", Corporate Social Responsibility and Environmental Management 17, no. 6 (November 1, 2010), 355–70.including how assurors may interpret the procedure's requirements. Directions for further research are discussed. Copyright © 2010 John Wiley & Sons, Ltd and ERP Environment.","DOI":"10.1002/csr.230","ISSN":"1535-3966","shortTitle":"How credible are mining corporations' sustainability reports?","journalAbbreviation":"Corp. Soc. Responsib. Environ. Mgmt","language":"en","author":[{"family":"Fonseca","given":"Alberto"}],"issued":{"date-parts":[["2010",11,1]]},"accessed":{"date-parts":[["2014",10,19]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}
339. United Nations, Universal Declaration of Human Rights (1948), Article 8; United Nations, International Covenant on Civil and Political Rights (1966), Article 2; United Nations, International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 6; United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46 (10 December 1984), Article 14; and United Nations, Convention on the Rights of the Child, (20 November 1989), Article 39. It is further provided for in a range of international humanitarian and international criminal law sources. See also United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005).
340. Ibid.
341. John Gerard Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework, Guiding Principle 25, Commentary.
342. Ibid.

8.2 Access to remedy through judicial mechanisms

8.2.1 Criminal law

Some States recognise the concept of corporate criminal liability[343] but its scope and conditions vary considerably across jurisdictions. Some States provide a list of offences to which it applies[344]; others identify when it does not.[345] Seventeen EU Member States now provide for some form of corporate criminal liability, which usually turns on a company's failure to act with due diligence to prevent certain crimes. Sanctions may include confiscation of proceeds and fines.[346] It has been suggested that where Member States recognise corporate criminal liability and have ratified the Rome Statute of the International Criminal Court, corporations may be prosecuted for international crimes, even if the Rome Statute itself does not apply to corporate actors.[347]

It is still uncommon, however, for companies to be prosecuted for crimes connected to human rights abuses. Examples of exceptions include Switzerland, where a gold refiner suspected of money laundering was prosecuted in connection with alleged war crimes in the Democratic Republic of Congo[348]. In France, a judicial investigation took place for the sale of a surveillance system to the Gaddafi regime in Libya[349]. In Germany, a complaint was taken up against a timber manufacturer's senior manager regarding abuses by its contracted security forces against a community in the Democratic Republic of Congo.[350] In the Netherlands, it is government policy to discourage Dutch companies from investing in settlements in the Israeli-occupied West Bank, viewing these as illegal under international law, and the Dutch public prosecutor has confirmed that it considers such business activity a potential war crime.[351]

8.2.2 Civil law

Civil or private law causes of action against businesses for harm or loss as well as failing to act with due care exist in most jurisdictions. Claimants relying on these in relation to alleged human rights abuses, however, must adapt their claims to fit private law concepts, substituting, for example, "assault", "false imprisonment", or "wrongful death", for "torture", "slavery" or "genocide". For claims brought in negligence, plaintiffs must show that a company owed them a "duty of care", which was then breached either by the company itself or through the conduct of individuals for whom it was vicariously liable, and that this breach resulted in harm.[352] An advantage of tort-based claims is that

343. "Business and International Crimes", Fafo, http://www.fafo.no/liabilities/. Regarding European countries, see further Clifford Chance, Corporate Liability in Europe (2012), http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf
344. See Indonesia and Japan, ibid.
345. See France, ibid.
346. Applicable to Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain, and the United Kingdom. See Augenstein, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union.
347. Rome Statute of the International Criminal Court, A/CONF.183/9, 39 I.L.M. 999 (17 July 1998). Article 25(1) restricts ICC jurisdiction to natural legal persons. France, Belgium, Germany, the Netherlands, Spain, and the United Kingdom, for example, criminalise genocide, crimes against humanity, and war crimes within their national laws. International Commission of Jurists (ICJ), Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability (Geneva: 2008), http://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/.
348. Tom Miles and Emma Farge, "Switzerland Opens Probe into Gold Refiner Argor for Congo Dealings", Reuters, November 4, 2013, http://www.reuters.com/article/2013/11/04/congo-gold-idUSL5N0IP29K20131104.
349. International Federation for Human Rights, Amesys Case: The Investigation Chamber green lights the investigative proceedings on the sale of surveillance equipment by Amesys to the Khadafi regime (2013), http://www.refworld.org/docid/511cb668a.html.
350. "Criminal Complaint Filed Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses against Congolese Community", European Center for Constitutional and Human Rights (ECCHR), http://www.ecchr.de/danzer-en.html.
351. Mark B. Taylor, Human Rights Due Diligence: The Role of States — 2013 Progress Report (International Corporate Accountability Roundtable, 2013), 11, http://accountabilityroundtable.org/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL.pdf.
352. Richard Meeran, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States", City University of Hong Kong Law Review 3 (2011), 1. Under English law, whether or not a duty arises is dependent on a three-stage test: (a) was the harm foreseeable; (b) was there sufficient proximity between the parties; and (c) is it fair, just and reasonable to impose a duty of care?

they may reinstate victims to a position that they would have been in — at least in financial terms — had the negligence not occurred. They can also create a deterrent against future wrongdoing.[353] The French Parliament is currently considering a bill that would amend the penal, civil and commercial codes to put a duty on French companies to monitor their human rights impacts and take action accordingly. Companies would be liable for abuses unless they could demonstrate that they had put in place due diligence systems, while a defence to liability would be proof that the company was unaware of any activity having negative human rights impacts and that it made every effort to avoid such impacts.[354]

8.2.3 Administrative law

In some States, administrative law is used to penalise companies for breaching regulations, for example, environmental or health and safety regulations.[355] Penalties can include fines, restricting company operations in specific economic areas, exclusion from public procurement, publicising convictions and penalties, and confiscation of property.[356]

8.2.4 Constitutional law

It is possible, albeit challenging, to find constitutional causes of action for corporate-related human rights abuses. Traditionally, constitutional rights have been seen as protecting freedoms from excesses of State power. For a constitutional rights claim to proceed in connection with a business, then one of the following must apply: i) the constitution must expressly provide that legal persons (including corporations) are bound by constitutional rights provisions[357]; ii) a court must have recognised that some or all of the rights guaranteed in the constitution apply directly to non-state actors; or iii) the court must recognise:

a) that constitutional rights can be extended to a private actor either by virtue of its being an agent of the State or because its activities amount to "State action"[358]; or because it is carrying out "functions of a public nature".[359]
b) that constitutional rights require States to protect rights-holders against third party interferences with his or her rights; or
c) that the court has a duty to uphold constitutional rights, or at least to apply constitutional values in deciding cases, even if the actors involved are private parties.[360]

Comparative studies highlight a fairly conservative jurisprudence with regard to constitutional rights in the private sphere, more so with regard to business-related abuses. Successful cases are few in number and confined to restricted areas such as defamation, privacy or labour disputes. Securing locus standi is difficult, especially where victims are reliant upon public interest groups to pursue

353. Ibid.
354. Assemblée Nationale, Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, No 1524 (2013), http://www.assemblee-nationale.fr/14/propositions/pion1524.asp. See Mark B. Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies', European Company Law 11, no. 2 (2014), 86.
355. Business and Human Rights Resource Centre, Annual Briefing - Corporate Legal Accountability: Executive Summary (2013), http://business-humanrights.org/sites/default/files/media/documents/corp-legal-acc-annual-briefing-final-nov-2013.pdf.
356. Ibid. See, for example, U.S. Sentencing Guidelines where companies can be put on probation, which requires proof of compliance with the law, combined with implementation of an ethics programme and periodic reporting on its progress in implementing the designated reform programme. See further: United States Sentencing Commission, US Sentencing Guidelines Manual (2012), para.8D1.4, page 527, http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_8.pdf.
357. See, for example, The Republic of South Africa, Constitution of the Republic of South Africa (1996), section 8(2), 8(3) and 39(2); in India, certain fundamental rights are expressly guaranteed against non-state actors, e.g., Articles 15(2), 17, 23 and 21. See Surya Deva, Access to Justice: Human Rights Abuses Involving Corporations — India (International Commission of Jurists, 2011), http://papers.ssrn.com/abstract=2034813.
358. Stephen Gardbaum, "Where the (state) Action Is", International Journal of Constitutional Law 4, no. 4 (2006), 760.
359. The United Kingdom, Human Rights Act 1998 (1998), Section 6(3)(a) and 6(3)(b) http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1. See further Joint Committee on Human Rights, The Meaning of Public Authority under the Human Rights Act (The House of Commons London: The Stationery Office Limited, 2007).
360. This German constitutional law doctrine known as Mittelbare Drittwirkung is premised upon the idea that the judiciary, as an arm of the state, is bound by fundamental rights in all its operations. See further Eric Engle, "Third Party Effect of Fundamental Rights (Drittwirkung)", Hanse Law Review 5 (2009), 165–173.

cases on their behalf. One positive example, however, is a Seoul High Court ruling in July 2013 that Nippon Steel & Sumitomo Corp were liable to pay compensation of ₩100 million (US$88,000) to each of four South Korean workers for "crimes against humanity" and forced labour during Japan's colonisation of Korea from 1910–1945. The court held that the originating company, Japan Iron and Steel, had committed acts that were against international law and the constitutions of Korea as well as Japan.[361]

8.2.5 Regional human rights mechanisms in Europe and Asia

At present, there is no regional human rights mechanism in Asia. The response to business and human rights issues of regional human rights mechanisms in Europe is discussed in section 5.1 above.

8.2.6 Barriers to accessing remedy through judicial mechanisms

The GPs identify judicial mechanisms as fundamental to access to remedy but note that their effectiveness is dependent upon judiciaries and the judicial systems being impartial, having integrity and following due process. Further, GP26 highlights that States must not erect legal, procedural or practical barriers to prevent cases from reaching their courts. Yet such barriers exist and typically make seeking access to remedy for corporate-related human rights abuses very difficult for victims. This is demonstrated, for instance, by the discrepancy between the vast numbers of reported business-related human rights abuses and the small number of cases reaching court, and the even smaller number that succeed.[362]

Whilst identifying a cause of action under domestic law is one challenge, the doctrine of forum non conveniens can be another. This allows a court to decline jurisdiction on the basis that the courts of another State provide the more appropriate forum, for instance, given the location of the parties, witnesses or evidence, or because the courts of the other forum (usually that of the host Statee) are more familiar with the applicable law. Studies of cases dismissed on this basis have found that they are rarely if ever refiled in an alternate forum.[363] Further legal and procedural barriers include the "act of State" doctrine, rules on immunity, and statutes of limitations, as well as restrictions on class actions or other forms of group litigation.[364]

Practical barriers to legal redress are highly relevant because many individuals and communities impacted negatively by business activities often experience poverty and social exclusion. Such rights-holders often lack the financial resources needed to pay for lawyers and other costs of filing a case. Navigating the legal system can be difficult if victims do not have the requisite knowledge, skills or language. Many poor people live in illegality and avoid the legal system for fear of exposure; they may mistrust courts, or be unable or unwilling to use legal vernacular to frame injurious experiences.[365] Moreover, human rights lawyers may be inexperienced in dealing with business cases; or lawyers with the requisite skills may be reluctant to take such cases on, due to legal uncertainty, financial risks, political sensitivity or judicial corruption.

The complex corporate structures of transnational businesses alongside the doctrine of separate corporate personality which raises a presumption against "piercing the corporate veil" to hold a parent company liable for the wrongs of a subsidiary presents a critical legal barrier to remedy. Whilst the

361. Ida Torres, "South Korean Court Orders Japanese Firm to Compensate Forced WWII Laborers", The Japan Daily Press, 10 July 2013, http://japandailypress.com/south-korean-court-orders-japanese-firm-to-compensate-forced-wwii-laborers-1032080/.
362. Mark B. Taylor et al., Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses (Fafo, Amnesty International and Norwegian Peacebuilding Centre, 2010), http://www.fafo.no/pub/rapp/20165/20165.pdf.
363. Gwynne Skinner et al, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (The International Corporate Accountability Roundtable, CORE, and the European Coalition for Corporate Justice, 2013)
364. See further Skinner et al., ibid.; and Taylor et al., Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses.
365. Michael R. Anderson, "Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs", IDS Working Paper 178 (2003), 16–19, https://www.ids.ac.uk/files/dmfile/Wp178.pdf.

mismatch between corporate legal structures and the business reality of economic interdependence of companies within a group has been often criticised,[366] courts remain hesitant to weaken this general rule. As such, parent companies are only rarely held liable at home for the transnational actions of members of their corporate group. Exceptionally, a number of negligence actions have succeeded in the UK on the basis that a parent company has been responsible for the occurrence of human rights abuses in a host State.[367] In 2012, a UK court held a parent company liable in negligence for harm to employees of one of its South African-based affiliates in the area of health and safety.[368]

8.3 Extraterritorial jurisdiction over business-related human rights abuses

For a variety of reasons, victims may try to seek remedies in either the State in which the perpetrator company is domiciled ("the home State') or another State with a basis for taking jurisdiction over the case. The GPs take the position that international law does not impose any duty upon States to assume responsibility for regulating the extraterritorial activities of businesses domiciled in their territory by adjudicating such cases; on the other hand, the GPs also state that international law does not prohibit States from doing so "provided there is a recognised jurisdictional basis."[369]

Currently, acceptance of jurisdiction and adjudication by home-State courts with regard to extraterritorial abuses by companies domiciled or resident in their jurisdiction is very limited. Most instances have occurred under the US Alien Tort Statute of 1789 (ATS), under which US courts have applied international human rights standards in cases between private parties on the basis of universal jurisdiction over gross human rights abuses.[370] Though cases initially focused on torture by public agents,[371] subsequent claims have raised corporate complicity with State agents in the perpetration of human rights abuses.[372] A 2013 judgement of the US Supreme Court in case of Kiobel v. Royal Dutch Petroleum[373] ostensibly sought to limit the ATS as an avenue of recourse for victims of business-related abuses, though later decisions of the US lower courts indicate that this route may not be entirely closed off for the future.[374]

8.3.1 Extraterritorial adjudication in Europe

In general, the scope of application of the ECHR, like other treaties, is territorial, and "jurisdiction" under Article 1 refers to the national territory of contracting States. Despite the obligation upon

366. See, for example, Jodie A. Kirshner, "Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute", Berkeley Journal of International Law 30 (2012), http://scholarship.law.berkeley.edu/bjil/vol30/iss2/1
367. Richard Meeran, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States".
368. Chandler v. Cape PLC [2012] 1 WLR 3111.
369. John Gerard Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework, Guiding Principle 9. para.4.
370. The ATS provides that US district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.
371. In 1980, in the case of Filartiga v. Pena-Irala, two Paraguayan nationals present in the US successfully used the ATS to sue another Paraguayan citizen for torture he had perpetrated on them in Paraguay: Filartiga v. Pena-Irala [1980] 630 F 2d 876, 878 (2d Cir.).
372. See, for example, Doe v. Unocal [2002] 395 F.3d 932 (9th Cir.), opinion vacated and reh'g en banc granted; Doe v. Unocal [2003] 395 F.3d 978 (9th Cir.).
373. Kiobel v. Royal Dutch Petroleum Co and Shell Transport and Trading Company Plc [2013] 133 S. Ct. 1659. In this case, 12 Nigerian nationals resident in the US made a claim against the companies on the basis that their Nigerian subsidiary had enlisted, aided and abetted the Nigerian Government in committing crimes against humanity, arbitrary arrest and detention and acts of torture. In a majority opinion, the US Supreme Court held that where a statute makes no clear indication of extraterritoriality, as is the case in the ATS, there is a presumption against its extraterritorial application, while also noting that prudential concerns about judicial interference in foreign policy are particularly strong in ATS litigation. It was held however that where claims "touch and concern the territory of the United States", and do so with sufficient force, this may displace the presumption.
374. See Al Shamari v. CACI, in which four Iraqi torture victims brought a claim against a US-based private contractor for providing interrogation services at Abu Ghraib prison. See: "Al Shimari v. CACI et al.", Center for Constitutional Rights, http://ccrjustice.org/alshimari.

Member States to provide an effective remedy,[375] it is only in exceptional circumstances that the ECtHR will accept jurisdiction over acts or omissions performed or producing effects outside a State's territory.[376]

The Brussels I Regulation/Lugano Convention allows companies domiciled in one EU Member State to be sued in that State for damages caused by harms occurring in another State covered by the Regulation.[377] European States must also recognise and enforce judgments for civil damages entered by other States. These rules have provided a platform for a handful of corporate-related human rights cases. In People of Nigeria v. Shell,[378] a Netherlands court accepted jurisdiction over three cases in which Nigerian fisherman and farmers claimed that Royal Dutch Shell had been negligent in overseeing oil production by its Nigerian subsidiary. In Yao Essaie Motto v. Trafigura Ltd,[379] a UK court exercised jurisdiction over a claim against a British company for its role in dumping toxic waste in the Ivory Coast.

While the Brussels I Regulation currently does not confer jurisdiction on EU Member State courts over claims lodged against third-country subsidiaries and contractors of European corporations, the laws of some European States do allow claimants to sue these entities if they can be considered a necessary or proper party to the claim. For example, the foreign subsidiary of a UK-based mining company was joined as a co-defendant to a claim brought in the UK courts by Peruvian nationals for alleged complicity with the government in using violence against protestors.[380] In Germany, § 23(1) of the Code of Civil Procedure confers civil courts jurisdiction over monetary claims if the defendant's assets are located within Germany. In the Netherlands, if there is a possibility that a Dutch-domiciled parent company can be held liable, then its foreign subsidiaries can come under the jurisdiction of the Dutch court. Additionally, the principle of forum necessitates determines grounds for the exercise of international civil jurisdiction over claims that would normally not fall within national courts' jurisdiction if effective opportunities to bring those claims in foreign fora are absent.

8.3.2 Extraterritorial adjudication in Asia

To date, no court in Asia has adjudicated over extraterritorial corporate-related human rights abuses. One development to note though is the Singaporean Transboundary Haze Pollution Act 2014.[381] This establishes criminal and civil liability, and significant penalties, for business entities whose activities cause haze which results from burning of forests and peatlands in neighbouring countries.[382] Section 4 of the Act states that it "shall extend to and in relation to any act or thing outside Singapore which causes or contributes to any haze pollution in Singapore," entailing liability even for foreign companies without assets in Singapore. Note however, that liability derives from harm caused in Singapore, which presents a different situation from the extraterritoriality cases described above where the harm occurred outside of the jurisdiction of the court approached.

375. European Court of Human Rights, Council of Europe, European Convention on Human Rights, Article13.
376. See, for example, Al Skeini and Others v. UK [2011] ECHR–GC, §§ 131 et seq; Jörg Polakiewicz, "Corporate Responsibility to Respect Human Rights: Challenges and Opportunities for Europe and Japan".
377. The Council of the European Union, Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No 44/2001 (22 December 2000); Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 2007 OJ L339/3 (30 Oct 2007).
378. Oguru v. Royal Dutch Shell PLC [2009] Court of the Hague, Docket Number HA ZA 09-579 (Neth.). See, e.g., Milieudefensie, The People of Nigeria Versus Shell: The Course of the Lawsuit, https://milieudefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit/view.
379. Motto & Ors v. Trafigura Ltd & Anor [2011] EWHC 90206 (Costs) (29 June 2011).
380. Guerrero v. Monterrico Metals Plc, [2009] EWHC (QB) 2475.
381. The Republic of Singapore, Transboundary Haze Pollution Bill, No. of 2014 (2014), https://www.reach.gov.sg/Portals/0/EConsult/144/Draft%20Transboundary%20Haze%20Pollution%20Bill%202014%20Public%20consultation.pdf.
382. Civil liability is incurred if any person in Singapore (a) sustains any personal injury, contracts any disease, sustains any mental or physical incapacity or dies; (b) sustains any physical damage to property; or (c) sustains any economic loss, including a loss of profits. An entity will be criminally liable if it: (i) engages in conduct, or condones conduct by another entity, which causes or contributes to haze pollution in Singapore; (ii) manages another entity which owns or occupies land overseas, if that other entity engages in conduct, or condones the conduct of another, which causes or contributes to haze pollution in Singapore. Fines of up to S$100,000 may be imposed for each day that the Pollution Standard Index (PSI) threshold is crossed, up to an aggregate fine of S$2 million.

A second example in Asia of a trans-boundary case relates to the Laotian-based Xayaburi Dam which, once built, will supply most of its power output to the Electricity Generating Authority of Thailand (EGAT). In June 2014, the Thai Supreme Administrative Court held that it had jurisdiction to hear a case filed by Thai villagers living along the Mekong River against EGAT and four other government bodies, who claim that environmental and health impact assessments were inadequate thus invalidating relevant government agreements relating to the construction of the dam and the electricity supply.[383]

8.3.3 The viability of judicial mechanisms for business-related human rights abuses

Whilst an "expanding web of liability" exists to potentially close some of the current "gaps" in remedy for corporate-related human rights abuses, this does not yet translate into effective systems of remedy. According to Zerk, "... in practice, from the perspective of those seeking to hold companies to account, the system is patchy, uneven, often ineffective, and fragile."[384] The use of extraterritorial adjudication also remains controversial. It can provide redress for victims where this would otherwise be lacking; and can also contribute to deterrence and generally strengthen respect for human rights and the rule of law. Arguably, however, it can distract from efforts to strengthen local access to justice, regulation and good governance in states where abuses take place. It may also encroach on their sovereignty and, by drawing courts into such matters, carry risks in the areas of foreign policy and diplomacy.[385]

8.4 State-based non-judicial mechanisms

Even effective, well-resourced judicial systems cannot address all wrongs. Sometimes a judicial remedy is not required or favoured by claimants. GP27 highlights state-based non-judicial mechanisms as an important complement to judicial remedies in these situations. Expanding the mandate of administrative, legislative and other non-judicial mechanisms — which may be "mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes..." — is recommended by the GPs. The GPs specifically highlight NHRIs and National Contact Points under the OECD Guidelines for Multinational Enterprises.

NHRIs are independent bodies established by national law or constitutions to promote and protect human rights, for instance, through monitoring, investigations, research and education.[386] The UNHRC recognises that the mandate of NHRIs includes business and human rights[387] and NHRIs are increasingly putting this mandate into action both in Europe and Asia.[388] The Scottish and Northern Ireland Human Rights Commissions, for example, have considered the issue of public

383. "Justice for the Mekong – Thai Villagers Back to Court", Chiangrai Times, June 22, 2014, http://www.chiangraitimes.com/justice-for-the-mekong-thai-villagers-back-to-court.html.

384. Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies (Office of the United Nations High Commissioner for Human Rights, 2013), http://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticelawremedies.pdf.

385. Nadia Bernaz, "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?", Journal of Business Ethics 117, no. 3 (2013), 508.

386. United Nations General Assembly, Principles relating to the status of National Institutions (Paris Principles), Resolution 48/134 (4 March 1994), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement.

387. United Nations General Assembly, Human rights and transnational corporations and other business enterprises, A/HRC/17/L.17/Rev.1, (15 June 2011).

388. In 2010, NHRIs' International Coordinating Committee issued its Edinburgh Declaration ("The 2010 Edinburgh Declaration [10th Biennial Conference of the ICC]", International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights), http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/10th%20%20Biennial%20Conference%20of%20the%20ICC.aspx, and subsequently both the Asia Pacific Forum of NHRIs and European Network of NHRIs have developed regional action plans on business and human rights: "NHRI Capacity Building", International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/Capacity%20Building.aspx. Business and Human Rights: A Guidebook for NHRIs was published on behalf of the ICC in 2013: Nora Götzmann and Claire Methven O'Brien, Business and Human Rights: A Guidebook for National Human Rights Institutions (International Coordinating Committee of National Human Rights Institutions and Danish Institute for Human Rights, 2013), http://www.humanrights.dk/publications/business-and-human-rights.

procurement.[389] India's National Human Rights Commission, in focusing on labour standards, has developed a specific approach to responding to suspected bonded labour, using a combination of its powers to trigger inspections by relevant agencies, alternatively to inspect businesses itself and, where needed, issue discharge certificates to free workers and organise their rehabilitation, and take legal action against employers.[390]

In Asia, victims of abuses are increasingly seeking out NHRIs as a means of accessing remedy. Between 2007 and 2012, the Malaysian NHRI, SUHAKAM received 39 complaints against logging companies, plantations, security and finance companies for trespass and damage to native customary land as a result of logging activities, denial of rest days for employees, late payment of salary, unfair dismissal. Similarly, 1,009 of the 5,422 human rights cases handled by Komnas HAM, the Indonesian Human Rights Commission in the period January–November 2012 were complaints against businesses in areas such as land and labour disputes. Victims are also starting to file complaints with the NHRI of the State where the perpetrating company is based.[391]

Countries adhering to the OECD Guidelines are required to have an NCP to promote respect for the Guidelines and to handle complaints about breaches by corporations, which some NCPs approach through mediation and conciliation.[392] As a result of sustained civil society campaigns[393] and OECD support for capacity strengthening, NCPs are adopting more proactive approaches to human rights issues. For example, the Italian NCP, together with the OECD Secretariat, have taken steps to promote coherence amongst OECD registered companies operating in Myanmar.[394] Further, the Norwegian NCP has undertaken a full investigation of alleged abuses of indigenous peoples' rights by a Norwegian mining company in the Philippines.[395]

8.5 Non-State-based grievance mechanisms

The GPs promote non-State-based grievance mechanisms on the basis that they can offer a remedy to victims where grievances do not raise actionable matters of law. They can be faster and cheaper than legal action; they can provide an "early warning system" about potential abuses before situations escalate, and they provide a means of enabling companies to improve stakeholder relationships whilst empowering communities to engage effectively with companies.[396] The GPs identify two categories of such mechanisms: (a) regional or international human rights bodies and (b) operational or project-level grievance mechanisms designed and administered either by the company alone or with its stakeholders, or by an industry association or a multi-stakeholder group (see section 9).[397] GP28 establishes that States are to facilitate access to these mechanisms. GP31 sets out eight

389. "Our Work", Scottish Human Rights Commission, http://scottishhumanrights.com/ourwork; and Northern Ireland Human Rights Commission, Public Procurement and Human Rights in Northern Ireland (Belfast, 2013), http://www.nihrc.org/uploads/publications/NIHRC_Public_Procurement_and_Human_Rights.pdf.
390. National Human Rights Commission, Business And Human Rights: The Work of the National Human Rights Commission of India On the State's Duty to Protect (New Delhi: 2014).
391. For example, villagers from Cambodia and Thailand, along with their NGO representatives, delivered a complaint to SUHAKAM raising human rights and environmental concerns about the work of Malaysian company, Mega First, on the Don Sahong Dam project in Laos. "No Fish, No Food: NGO Coalition Files Complaint Against Don Sahong Dam Developer", EarthRights International, http://www.earthrights.org/media/no-fish-no-food-ngo-coalition-files-complaint-against-don-sahong-dam-developer
392. The OECD hosts a database of "specific instances", the term for complaints. See "Database of specific instances", OECD Guidelines for Multinational Enterprises, https://mneguidelines.oecd.org/database/.
393. OECD Watch has led a long campaign for improved handling of specific instances by NCPs: OECD Watch, http://oecdwatch.org/.
394. "The Italian NCP in Myanmar", Punto Di Contatto Nazionale, http://pcnitalia.sviluppoeconomico.gov.it/en/news/item/285-the-italian-ncp-in-myanmar.
395. Jill Shankleman and Susan Tamondong, Report of the fact-finding mission to Mindoro, the Philippines (Royal Ministry of Foreign Affairs, 2013), http://www.responsiblebusiness.no/files/2013/12/intex_fivh_fact_finding2.pdf
396. Emma Wilson and Emma Blackmore, Dispute or Dialogue? Community Perspectives on Company-Led Grievance Mechanisms (International Institute for Environment, 2013), http://pubs.iied.org/16529IIED.html.
397. See Human Rights & Grievance Mechanisms, http://grievancemechanisms.org/ and Access Facility, a descriptive database of non-judicial mechanisms and case stories: ACCESS Facility, http://www.accessfacility.org/. See also: Shift, Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights (New York: 2014), http://shiftproject.org/sites/default/files/May%202014%20Shift%20BLP%20Workshop%20Report%20Remediation.pdf

criteria for ensuring their effectiveness. These are their legitimacy, accessibility and predictability, fairness and equitability between parties, transparency, rights compatibility, continuous learning and the requirement that such mechanisms be based upon engagement and dialogue as a means for addressing the grievance and delivering effective remedy.

Practical experiences have, however, raised concerns about non-State-based operational-level grievance mechanisms. Where national legislation does not comply with human rights standards, remedies provided may not be compatible with human rights. Victims may be offered (and they may accept) compensation that does not reflect the damage caused or their entitlement, for instance, to restitution, other human rights and cultural preferences.[398] Confidentiality may hinder the deterrent effect, and non-judicial mechanisms may be ill-equipped to address gross and systemic human rights abuses. This last concern arose in relation to the Olgeta Meri Igat Raits ("All Women Have Rights") Framework of Remediation Initiatives established by Barrick Gold to address sexual violence against women committed by security officers around its Porgera Joint Venture mine in Papua New Guinea.[399] Local women who were sexually assaulted were offered monetary compensation, health and education services, but only if they waived their legal rights to sue the company in future.[400] The legitimacy of this approach and its impact on State law enforcement has been heavily questioned.[401]

8.6 Improving access to remedy

In light of the legal, procedural and practical barriers highlighted in this section, there are important debates about what steps should be taken to ensure effective access to remedy. Some take the view that solutions lie at the national level. A recent report recommends that States should legislate to establish criminal and civil liability for companies that fail to implement due diligence policies, to provide for collective redress mechanisms, and for legal aid to be extended to victims of corporate human rights abuses occurring outside the territory.[402] Currently, the only means of punishing businesses in many jurisdictions is through fines, which may be inadequate for a variety of reasons: they may not necessarily have the desired deterrent value; the liability to pay does not always rest upon the entity that is ultimately responsible, and they may viewed as not being commensurate with serious human rights abuses.[403] One proposal has been that companies found guilty of such abuses should have their right to operate withdrawn.[404] Access to information, disclosure and transparency are critical, as victims need to be aware of their human rights and of available remedies in order to pursue them. Most recognise the importance of building the capacity of public authorities, business enterprises and civil society to better prevent abuses in the first place. A recent UNHRC resolution requested OHCHR to continue to work on domestic law remedies for gross human rights abuses and asked the UNWG to launch an inclusive and transparent consultative process to facilitate the sharing of legal and practical measures to improve access to remedy, both judicial and non-judicial, and to consider the benefits and limitations of a legally binding instrument.[405]

398. ACCESS Facility and the United Nations Working Group on Business and Human Rights, Expert Meeting Report: ACCESS to Remedy in Context of Business and Human Rights: Improving the Effectiveness of Non-Judicial Grievance Mechanisms, (The Hague: April 3, 2014), http://business-humanrights.org/sites/default/files/documents/Report%20Expert%20Meeting%20on%20Grievance%20Mechanisms_ACCESS%20Facility_The%20Hague_%203-4%20April%202014_0.pdf
399. Barrick Gold Corporation and the Porgera Joint Venture, Olgeta Meri Igat Raits ("All Women Have Rights"): A Framework of Remediation Initiatives in Response to Violence against Women in the Porgera Valley (2012), http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf.
400. Jonathan Kaufmann, Letter to the UN High Commissioner on Human Rights (Business and Human Rights Resource Centre, 2013), http://business-humanrights.org/en/doc-letter-to-un-ohchr-regarding-the-porgera-joint-venture-remedy-framework.
401. Sarah Knuckey, "On Australia's Doorstep: Gold, Rape, and Injustice", The Medical Journal of Australia 199, no. 3 (2013).
402. Gwynne Skinner et al., The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business.
403. Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies.
404. Email communication with Sif Thorgeirsson, Business and Human Rights Resource Centre, 11 September 2014.
405. Human Rights Council, Human rights and transnational corporations and other business enterprises, A/HRC/26/L.1.

The UNWG can and has received communications from alleged victims. It cannot however adjudicate on these nor impose sanctions, only exhort States and companies to prevent or redress abuses.[406] Hence, the proposals for international agreements to oblige States to provide remedies in either national criminal or civil law for business-related abuses (see section 2.2). One focus, encouraged by the SRSG, has been the idea of a treaty to criminalise corporate conduct leading to "serious" or "gross" human rights abuses, taking inspiration from the UN Convention Against Corruption.[407] A more recent idea has been for a tribunal of experts to hear and apply civil law principles and alternative dispute resolution methods such as arbitration and mediation to resolve cases involving corporate-related human rights abuses.[408]

9. Working group IV: Multi-stakeholder collaboration

9.1 Defining multi-stakeholder initiatives and Corporate Responsibility Coalitions

Multi-stakeholder initiatives (MSIs) involve companies, other non-State actors such as NGOs and sometimes governments and public bodies in setting standards with regard to the social and environmental dimensions of business behaviour, and contributing to aspects of good governance, including transparency, participation and accountability. By alternative means of ensuring compliance by corporate actors with human rights standards, for handling grievances arising from alleged violations and for broadly securing businesses' social license to operate in a globalised context, they can be viewed as an efficient mechanism for managing the human rights impacts of global corporate activity.[409] Corporate responsibility coalitions are another alternative governance mechanism used to address human rights. These may be defined as "independent, non-profit membership organisations that are composed mainly or exclusively of for-profit businesses that have a board of directors composed predominantly or only of business people; that are core-funded primarily from business; and whose purpose is to promote responsible business practice."[410] According to one study, such coalitions can have the following impacts: first, they may raise awareness and make the case for responsible business; second, they can help companies to embed responsible practices into core operations and value chains; third, they may support the development of common visions and agendas for action; and fourth, they can constitute a platform for collective action to drive scale and systemic change.[411]

9.2 Rationales for MSIs

Both the models discussed above reflect a broader trend towards private rule-making. Indeed, a shift away from State-based regulation has been viewed by some as inevitable in a globalised, transnational, multi-sector world,[412] where a "regulatory fracture" within the global economy puts highly globalised systems of production beyond individual States' regulatory reach.[413] Some

406. UN Working Group on Business and Human Rights, The UN Working Group on Business and Human Rights' work in handling individual cases of alleged violations and abuses (United Nations Office of the High Commissioner for Human Rights, 2014) http://www.ohchr.org/Documents/Issues/Business/WGBrief_Communications_with_States_and_non-State_actors_12.03.2014.pdf.
407. The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Recommendations on Follow-up to the Mandate (2011), 5, http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf.
408. Claes Cronstedt et al., An International Arbitration Tribunal on Business and Human Rights (2014), http://www.l4bb.org/news/IntlArbTribunal25Feb2014.pdf.
409. Peter Utting, "Introduction: Multi-stakeholder regulation from a development perspective", in Darryl Reed et al. (eds.), Business Regulation and Non-State Actors: Whose standards? Whose development? (London: Routledge, 2012).
410. David Grayson and Jane Nelson, Corporate Responsibility Coalitions: the past, present and future of alliances for sustainable capitalism (Stanford University Press and Greenleaf Publishing, 2013).
411. Ibid.
412. Maurits Barendrecht et al., Rulejungling: When Lawmaking Goes Private, International and Informal (HiiL, 2012), http://www.hiil.org/data/sitemanagement/media/HiiL_TrendReport2_compleet_041012_DEF%20(2).pdf.
413. Boaventura de S Santos and Cesar A. Rodriguez-Garavito, "Law, Politics and the Subaltern in Counter-Hegemonic Globalisation", in Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito (eds.), Law and Globalisation from Below: Towards a Cosmopolitan Legality (Cambridge University Press, 2005).

perceive States and intergovernmental organisations as now lacking the institutional capabilities and capacities to address problems satisfactorily. Others view an increase in non-State regulatory instruments as being driven by a rise of neo-liberal policies.[414] Yet others suggest that their appearance is as a result of pressure from transnational advocacy movements seeking new means of holding corporations to account for social and environmental "externalities". Their emergence have also been attributed to a corporate imperative to respond quickly with risk management tools that are capable of deflecting State-based regulation, quelling reputational damage and ensuring the viability of business operations in the face of social resistance.[415]

According to the SRSG, MSIs are a necessary "gap-filler" that can help to manage corporate activities that slip through existing frameworks, either by design or default[416]; some suggest this to be the case apropos the steady marginalisation of labour in the management of production and workplace relations over recent decades.[417] The purpose of human rights and business MSIs is, according to this view, to allocate shared responsibilities and establish mutual accountability mechanisms for human rights within complex networks that can include any combination of host and home States, corporations, civil society actors, industry associations, international institutions and investor groups.

9.3 Scope of MSIs

Current MSIs encompass a range of activities including: norm-development and standard-setting, monitoring, verification and certification, awareness-raising, providing a platform for sharing dilemmas, analysing problems and finding collaborative solutions; encouraging experimentation with forms of collaborative governance; promoting learning and capacity-building; and providing grievance mechanisms and alternative dispute resolution.[418] In pursuing these tasks, most MSIs rely on collaborative approaches.[419] Whereas early MSIs concentrated upon working conditions in global supply-chains and the extractive sector, today a variety of initiatives exist to tackle issues for wide range of specific industries or issues. Alternatively, some bring together companies, civil society and governments to dialogue and act on a whole plethora of sustainability and human rights related issues, for example, the UN Global Compact.

MSIs may require their members to comply with relevant national laws, or alternatively, to meet standards going beyond current national legal requirements by referencing international standards such as the UDHR or ILO Conventions. Certain MSIs may be grouped into a category characterised as "non-State market-driven" governance systems. The key characteristics of these sorts of regimes are that they: (i) create binding and enforceable internal rules for their members or stakeholders; (ii) set standards and monitor compliance with both standards and internal rules; (iii) may provide certification for a product or service following monitoring and verification processes; and (iv) may have a grievance mechanism or dispute resolution procedure. Some argue that these MSIs "offer the strongest regulation and potential to socially embed global markets."[420] Examples include the Forest Stewardship Council (FSC),[421] the Fair Labor Association,[422] the Ethical

414. Tim Bartley, "Certifying Forests and Factories: States, Social Movements and the Rise of Private Regulation in the Apparel and Forest Product Fields", Politics and Society 31 (2003).
415. Walter Mattli and Tim Büthe, "Setting International Standards: Technological Rationality or Primacy of Power?", World Politics 56(1) (2003), 1–42.
416. John Gerard Ruggie, Just Business. See also Susan Strange, The Retreat of the State (Cambridge University Press, 1996).
417. Claire Methven O'Brien, "Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law — Parts I/II", German Law Journal 9 (2008), http://www.germanlawjournal.com/index.php?pageID=11&artID=983, and Claire Methven O'Brien, "The UN Special Representative on Business and Human Rights: re-embedding or dis-embedding transnational markets?", in Christian Joerges and Joseph Falke (eds.), Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets (Oxford: Hart, 2011).
418. See Mariette van Huijstee, Multistakeholder Initiatives: A strategic guide for civil society organizations (Amsterdam: SOMO, 2012); Scott Jerbi, Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda (International Review of the Red Cross, 2012), https://www.icrc.org/eng/resources/documents/article/review-2012/irrc-887-jerbi.htm; MSI Integrity, http://www.msi-integrity.org/.
419. Scott Jerbi, Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda.
420. on and Governance 1 (2007).
421. See Forest Stewardship Council, https://us.fsc.org/.
422. See Fair Labor Association, http://www.fairlabor.org.

Trading Initiative,[423] the Roundtable on Sustainable Palm Oil[424] and others established specifically to regulate primary commodity industries.

Within this category of MSIs, participating companies respond primarily to the need to ensure that the goods or services they sell are not disadvantaged in the marketplace through association with bad environmental or social impacts; alternatively that their goods and services benefit from association with good practices and impacts. Non-State market governance regimes can be regarded as promoting and enforcing norms that are public goods, though a risk of being market-driven is that markets do not always incentivise environmentally or socially-responsible behaviour.

9.4 MSI governance

Given the variety of players involved in MSIs, each with different interests, visions and stakes, resources and forms of power at their disposal, having a clear internal governance framework based on principles such as transparency, accountability, equitable stakeholder representation and participation is crucial to an MSI's effectiveness. Equally essential is that the MSI maintain outward transparency and accountability with regard to standards, working procedures, and complaints mechanisms.[425] This raises the question of which stakeholder category, if any, should be "in charge". The European Parliament, for instance, has indicated that in the area of CSR a leading role should be afforded to businesses, which "must be able to develop an approach tailored to their own specific situation..."[426] On the other hand, having labour or civil society participants in leadership roles could better ensure that rights-compatibility of standards and governance arrangements are paramount, lending greater credibility and legitimacy to the MSI and ultimately delivering greater benefit to businesses taking part.

With the aims of strengthening MSI governance and harmonising practice across them, a number of meta-MSI governance initiatives have been established. The ISEAL Alliance is an NGO that aims to "strengthen sustainability standards systems".[427] Membership is open to "any multi-stakeholder sustainability standards and accreditation body" that can show it meets the ISEAL Codes of Good Practice and commits to "learning and improving". Though not eligible for membership, governments, researchers, consultants, private sector bodies, non-profits and other "stakeholders with a demonstrable commitment to the ISEAL objectives" can also participate. A code for impact assessment launched by ISEAL in 2010 requires members to develop and implement a monitoring and evaluation plan, by identifying the impact they seek to achieve, defining strategies, choosing indicators and collecting data, conducting regular analysis and reporting as well as additional impact evaluations, and setting up feedback loops to improve their standard's content and systems over time.[428] Another initiative that aims to map and evaluate business and human rights MSIs is the US-based Institute for Multi-Stakeholder Initiative Integrity. Its objective is to analyse whether MSIs are effective human rights mechanisms and how their effectiveness can be improved.[429]

Analysis, standards and guidance of the kind that meta-MSIs intend to generate ought to help harness the potential of MSIs to contribute to good governance and the rule of law, in spite of a dynamic global environment that can readily elude slower and more formal State-based forms of rule-making, monitoring and enforcement. Yet it will remain important to guard against a "cut-and-paste"

423. See Ethical Trading Initiative, http://www.ethicaltrade.org/.
424. Roundtable on Sustainable Palm Oil, http://www.rspo.org/. These include the Roundtables on responsible soy (RTRS), the Better Cotton Initiative (BCI), Better Sugarcane Initiative (BSI) and Roundtable on sustainable biofuels (RSB).
425. Mariette Van Huijstee, Multistakeholder Initiatives: A strategic guide for civil society organizations.
426. Raffaele Baldassarre, Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth, 2012/2098(INI)) / A7-0017/2013 (2013), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0017+0+DOC+PDF+V0//EN.
427. The four goals of ISEAL Alliance are to: Improve the impacts of standards; Define credibility for sustainability standards; Increase the uptake of credible sustainability standards; and Improve the effectiveness of standards: ISEAL Alliance, http://www.isealalliance.org/.
428. The ISEAL Code of Good Practice for Assessing the Impacts of Social and Environmental Standards (Impacts Code). See: 'Impacts Code', ISEAL Alliance, http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice/impacts-code.
429. MSI Integrity, http://www.msi-integrity.org/.

approach with regard to MSI design, which should be sensitive and responsive to the particularities of their sector(s) and context.[430]

9.4.1 Government involvement with MSIs

In some cases governments are key targets of MSIs: the Extractive Industry Transparency Initiative (EITI), for instance, seeks governments' commitments to revenue transparency.[431] In general, though, there is no presumption of government involvement although in some cases, government buy-in has been critical to the success of individual initiatives. For example, it has been suggested that the arrival of an additional batch of governments a decade into its existence played an important role in strengthening the governance and effectiveness of the Voluntary Principles on Security and Human Rights.[432] By contrast, government absence has been important to success in other MSIs. In the case of the Fair Labor Association (FLA), although the initial convening role of the US Government was important in bringing together the stakeholders, its later withdrawal apparently permitted the FLA to be more agile and creative. More specifically, it allowed the FLA to operate in exporting countries without being challenged as an agent of US foreign or trade policy.[433]

The impact of MSIs can be boosted where there is alignment with State-based regulation and policies. Incorporating references to MSI certification schemes, for example, into screening and evaluation procedures during public procurement processes has potential to be a "market-making" step, given the status of governments as "mega-consumer".[434] MSIs can also play a role in laying the groundwork for State intervention by scoping out in advance its necessary elements, viable regimes, and likely implementation challenges in practice.

9.4.2 Civil society engagement with MSIs

Most MSIs include civil society organisations and in many cases, the MSIs' effectiveness can depend upon their participation. The importance of involving trade unions in MSIs dealing with workers' rights cannot be over-stated.[435] Yet, CSOs involved in MSIs need to constantly evaluate their participation. One question they should ask is how their participation in an MSI aligns with their overall goals and strategies to achieve change.[436] CSOs taking part in MSIs often come under scrutiny from others in their community who fear they may be co-opted by other stakeholders or that the collaboration with other members of the MSI may undermine broader advocacy agendas. Another key consideration is that involvement in MSIs can be highly demanding, in terms of time, staff and money, and CSOs, especially those in the global South, may experience multiple demands from MSIs that they do not have the resources or capacity to fulfil.

9.5 Examples of MSIs in the area of business and human rights

This section describes a sample of MSIs active in the business and human rights area.[437]

Ethical Trading Initiative (ETI): Launched in 1998 with the support of the UK government, the ETI is an alliance of companies, trade unions and NGOs that promotes respect for workers' rights around the world. Currently, the ETI focuses on: promoting good workplaces via support for suppliers

430. Mariette Van Huijstee, Multistakeholder Initiatives: A strategic guide for civil society organizations.
431. Ethical Trading Initiative, http://www.ethicaltrade.org/.
432. Scott Jerbi, Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda.
433. Justine Nolan, "Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights", Utrecht Journal of International and European Law 30:78 (2014).
434. Mariette Van Huijstee, Multistakeholder Initiatives: A strategic guide for civil society organizations; Northern Ireland Human Rights Commission, Public Procurement and Human Rights in Northern Ireland, and Stumberg et al., Turning a Blind Eye? Respecting Human Rights in Government Purchasing.
435. Ibid.
436. Mariette Van Huijstee, Multistakeholder Initiatives: A strategic guide for civil society organizations points out that it is crucial for a CSO to choose a role within the MSI that matches its organisational identity as it is projected internally as well as externally, in order to maintain its legitimacy and negotiating position.
437. For a more comprehensive listing, see "Coalitions and Multi-stakeholder Initiatives promoting corporate responsibility", Cranfield University, http://www.som.cranfield.ac.uk/som/p18696/Research/Research-Centres/Doughty-Centre-Home/Further-Resources/Coalitions-and-multi-stakeholder-initiatives.

in building strong management, human resource and industrial relations systems; payment of living wages; integrating ethics into core business practices; tackling workplace discrimination and improving audit practices.[438] Company members are expected to commit to implementing the ETI Base Code of labour practice,[439] which draws on core ILO Conventions, and to adopt its Principles of Implementation.[440] These require companies to demonstrate a clear commitment to ethical trade which respects labour standards; to integrate ethical trade into their core business practices; to drive year-on-year improvements to working conditions; to support suppliers to improve working conditions; and to report openly and accurately about their activities. Member companies must also work in partnership with trade unions and NGO members on projects aimed at tackling ethical trade issues, and submit annual reports to the ETI Board, setting out steps they are taking to tackle problems concerning working conditions in their supply chains. The ETI Secretariat, together with trade union and NGO representatives, conducts random validation visits to a minimum of 20% of ETI supplier members.

Extractive Industry Transparency Initiative (EITI): The EITI is a global coalition of governments, companies and civil society working together to improve government openness and accountability in the management of revenues from oil, gas and mineral resources.[441] EITI countries are required to disclose information on tax payments, licenses, contracts, production and other key elements around resource extraction.[442] The EITI Standard lays out seven requirements on how to report activity in the oil, gas and mining sectors along the value chain, from extracting a resource to converting it into public benefit. These are: i) permitting effective oversight by the multi-stakeholder group; ii) timely publication of EITI reports containing iii) contextual information about the extractive industries; and iv) full government disclosure of extractive industry revenues, and disclosure of all material payments to government by oil, gas and mining companies; v) a credible assurance process, applying international standards; vi) publication of reports that are comprehensible, actively promoted, publicly accessible, and that contribute to public debate; and vii) for the stakeholder group to take steps to act on lessons learned and review the outcomes and impact of EITI implementation.

The Roundtable on Sustainable Palm Oil (RSPO): Established under the Swiss Civil Code, the RSPO is based in Malaysia, with a liaison office in Indonesia.[443] The RSPO's membership comprises stakeholders from seven sectors of the palm oil industry: oil palm producers, palm oil processors and traders, consumer goods manufacturers, retailers, banks and investors, environmental and development NGOs. Its mission is to (i) advance the production, procurement, finance and use of sustainable palm oil products; (ii) develop, implement, verify, assure and periodically review credible global standards for the entire supply-chain of sustainable palm oil; (iii) monitor and evaluate the economic, environmental and social impacts of the uptake of sustainable palm oil in the market; and (iv) engage and commit all stakeholders throughout the supply chain including governments and consumers.[444] The RSPO's regulatory standards are pluralistic, drawing on national laws, international standards, customary laws, public discourses and lex mercatoria.[445] Certification of members' palm oil production units follows verification of the production process by accredited agencies according to various indicators. Amongst these indicators are: commitment to the principle of Free, Prior and Informed Consent with regard to land acquisitions; compliance with international standards on human rights, labour and the environment; respect for customary rights of communities; environmental provisions on pesticide usage, agro-chemicals, maintenance of the quality of water and soil fertility, biodiversity, waste, energy efficiency, greenhouse gas emissions; labour standards, including on

438. "Our strategy", Ethical Trading Initiative, http://www.ethicaltrade.org/about-eti/our-strategy.
439. "ETI Base Code", Ethical Trading Initiative, http://www.ethicaltrade.org/eti-base-code.
440. "Principles of Implementation", Ethical Trading Initiative, http://www.ethicaltrade.org/resources/key-eti-resources/principles-implementation.
441. Extractive Industries Transparency Initiative, https://eiti.org/.
442. Forty-eight countries implement the EITI, with 31 currently compliant with its standards. Extractive Industries Transparency Initiative, Fact Sheet (2014), https://eiti.org/files/EITI_Factsheet_EN_0.pdf.
443. Roundtable on Sustainable Palm Oil, http://www.rspo.org/.
444. "About Us", Roundtable on Sustainable Palm Oil, http://www.rspo.org/about.
445. "Membership Documents", Roundtable on Sustainable Palm Oil, http://www.rspo.org/resources/key-documents/membership.

freedom of association, child labour and sexual harassment; impact assessments in advance of new plantings; commitments to transparency and accountability, and a grievance procedure for dispute resolution.[446] RSPO's grievance mechanism, which is competent to receive complaints relating to its members, has a mandate to decide on the legitimacy of the complaint and to decide on the course of action that the member needs to take, with reference to its own statutes, by-laws and Code of Conduct.[447] Additionally, the RSPO makes available a dispute settlement facility to support RSPO members (notably growers), local communities and other stakeholders to use mediation to resolve disputes.[448]

Voluntary Principles on Security and Human Rights (VPs): Established in 2000, the VPs aim to ensure that companies respect human rights in the context of security operations to protect their facilities, personnel and assets.[449] VPs norms require: regular consultations between companies and host governments, and local communities; proportionality in the use of force; company engagement in promoting protection of human rights by security contractors; monitoring of the progress of investigations into alleged abuses; ensuring security contracts reflect VPs terms and requirements; and background checks on private security companies that participants intend to employ.[450] The VPs membership comprises seven States, 11 NGOs, 21 companies and five organisations with observer status. In response to concerns about transparency, the VPs were amended to establish minimum requirements for participation; a dispute resolution process, allowing concerns about participants' performance to be raised; clearer accountability mechanisms; and a measure of public reporting on implementation. A greater focus is now put upon local implementation through "in-country processes", that is, multi-stakeholder fora that support implementation and integration of the VPs at a national level.[451] Despite this, dialogue amongst VPs members remains confidential and reporting requirements are voluntary.

The Global Network Initiative (GNI): The GNI comprises a group of companies, NGOs, investors and academics that collaborate towards the protection and advancement of freedom of expression and privacy in the ICT sector.[452] It was launched in the context of increasing pressure being put on ICT companies to comply with domestic laws in ways that undermine human rights, in particular from governments and their law enforcement agencies. The GNI is based on a set of "Principles on Freedom of Expression and Privacy". These oblige participating companies to respect and protect the freedom of expression and privacy rights when confronted with government demands, laws or regulations that compromise these in a manner inconsistent with internationally recognised laws and standards. Correspondingly GNI companies undertake to avoid or minimise the impact of government restrictions, including on information available to users and opportunities for users to create and communicate ideas and information, regardless of frontiers or media of communication. They also vow to protect personal information so as to protect the privacy rights of users.[453] A set of Implementation Guidelines guide companies on how to operationalise the Principles in an accountable manner.[454]

Electronics Industry Citizenship Coalition (EICC): EICC attempts to improve social, ethical, and environmental responsibility in the global electronic industry supply chain. Founded in 2004 by

446. Roundtable on Sustainable Palm Oil, Principles and Criteria for the Production of Sustainable Palm Oil (2013), http://www.rspo.org/file/RSPO%20P&C2013_with%20Major%20Indicators_Endorsed%20by%20BOG_FINAL_A5_v1.pdf.
447. "Complaints", Roundtable on Sustainable Palm Oil, http://www.rspo.org/members/complaints.
448. "Dispute Settlement Facility", Roundtable on Sustainable Palm Oil, http://www.rspo.org/members/dispute-settlement-facility.
449. Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/. Note the International Code of Conduct for Private Security Providers as a complementary initiative addressing directly the responsibilities of private security firms in conflict zones. See International Code of Conduct for Private Security Service Providers (Switzerland: 2010), http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.
450. Ibid.
451. For commentary, see "Voluntary Principles on Security and Human Rights", Business & Human Rights Resource Centre, http://business-humanrights.org/en/conflict-peace/special-initiatives/voluntary-principles-on-security-and-human-rights.
452. See Global Network Initiative, https://globalnetworkinitiative.org/.
453. See "Principles", Global Network Initiative, https://globalnetworkinitiative.org/principles/index.php.
454. See "Implementation Guidelines", Global Network Initiative, https://globalnetworkinitiative.org/implementationguidelines/index.php.

a small group of electronics companies, it now comprises of nearly 100 electronics companies.[455] EICC members must commit to implementing a Code of Conduct which references international norms and standards including the UDHR, ILO Core Labour Standards, OECD Guidelines for Multinational Enterprises and ISO standards, throughout their supply-chain. All EICC members' Tier 1 suppliers are required to implement the Code.[456] The EICC offers assessment tools to help members measure and understand if, and to what extent they are meeting EICC standards and membership requirements.[457] Where they are not being met, it provides tools that may help to remedy gaps in standards and establish systems to prevent reoccurrences in the future. The EICC does not, however, publicly comment on individual members' implementation or activities.

9.6 Examples of business-led corporate responsibility coalitions

As discussed above, business-led corporate responsibility coalitions are sector-specific initiatives providing companies with the opportunity to engage with each other as members of a common "epistemic" or knowledge-based community, in order to discuss shared dilemmas and challenges and possible solutions. According to a recent survey, there are now more than 110 national and international general-focus business-led corporate responsibility coalitions, as well as several hundred more sector- and issue-specific ones.[458] Five examples of such coalitions addressing business and human rights issues are briefly described below:

The Global Business Initiative on Human Rights (GBI): Led by a core group of eighteen major corporations headquartered in each of the world's major geographical regions, the GBI works through two tracks: Member Peer Learning, which enables participating companies to share practices, challenges and innovations with regard to the implementation of the GPs; and Global Business Outreach, where member companies engage with other businesses around the world to raise awareness and to support capacity building.[459] GBI also seeks to support constructive business inputs into international policy agenda. For example, it recently issued its position on the UN Human Rights Council's adoption of the resolution regarding the binding treaty on business and human rights.[460]

CSR Europe: Established as an international non-profit organisation, CSR Europe is a membership network comprising 70 corporate members and 39 national partner CSR organisations from around Europe.[461] In all, over 10,000 European-based companies are engaged through a platform, which seeks to support business towards enhancing sustainable growth and to make positive contributions to society. Its portfolio involves supporting companies in building sustainable competitiveness, fostering cooperation between companies and their stakeholders, and strengthening Europe's global leadership on CSR. Its workstreams are based on the EU's Europe 2020 strategy; consequently, they are orientated around the five targets of reducing unemployment; boosting investment in research and development; tackling climate change and energy sustainability; increasing educational opportunities; and fighting poverty and social exclusion.[462] CSR Europe also collaborates with CSR organisations across the world.

ASEAN CSR Network: The ASEAN CSR Network was launched in 2011. It is an initiative of the ASEAN Foundation and business organisations from Indonesia, Malaysia, Philippines, Singapore,

455. See Electronic Industry Citizenship Coalition, http://www.eiccoalition.org/.
456. See "Code of Conduct", Electronic Industry Citizenship Coalition, http://www.eiccoalition.org/standards/code-of-conduct/.
457. See "Assessment", Electronic Industry Citizenship Coalition, http://www.eiccoalition.org/standards/assessment/.
458. David Grayson and Jane Nelson, Corporate Responsibility Coalitions: the past, present and future of alliances for sustainable capitalism.
459. See Global Business Initiative on Human Rights, http://www.global-business-initiative.org/.
460. Five early recommendations for business: Responding to the prospect of an international treaty on Business and Human Rights (October 2014). See Mark Hodge, Five Early Recommendations for Business: Responding to the prospect of an international treaty on Business and Human Rights (Global Business Initiative on Human Rights, 2014), http://www.global-business-initiative.org/wp-content/uploads/2014/10/Article_BHR_Treaty.pdf.
461. See CSR Europe, http://www.csreurope.org
462. See Europe 2020 targets, European Commission, http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targets/index_en.htm.

Thailand and the Chamber of Commerce and Industry of Viet Nam. Its purpose is to encourage businesses within ASEAN to take account of economic, social and environmental impacts in the way they operate by aligning their business strategies and operations with the needs and expectations of stakeholders. As a normative base, the Network refers extensively to the Ten Principles of the UN Global Compact and ISO 26000. It describes itself as a platform for networking, exchange of best practice and peer discussions; a repository of ASEAN knowledge on CSR; a capacity-builder through training and the provision of common standards and benchmarking; an advocate for CSR; and a representative of the ASEAN business community to regional and intergovernmental agencies on policy issues regarding CSR. Interestingly, it also specifies that it is not "... a market place for CSR consultancies; a philanthropic or grant-giving organisation; an implementer of social or environmental projects at national level; or a regulating or 'policing' body".[463]

The Equator Principles (EPs): The EPs provide a risk management framework for financial institutions committed to assessing and managing environmental and social risk in large-scale projects.[464] Of global and sector-wide application, the EPs are applicable to four financial products: project finance advisory services; project finance; project-related corporate-loans; and bridge loans. Launched in 2003, and revised in 2006 and 2013, at present, 80 financial institutions in thirty-four countries have adopted the EPs, covering over 70% of international project finance in emerging markets. Banks that are signatories to the EPs commit to meeting the performance standards set by the International Finance Corporation (IFC) when providing project finance to clients. The 2013 revision of the EPs was intended to align them with the UN Framework.

International Council for Mining and Metals (ICMM)[465]: The ICMM's membership comprises 21 mining and metals companies and 32 national and regional mining associations and global commodity associations. Member companies are required to implement and measure their achievement against ten sustainable development principles; make public commitments towards improving sustainability performance and report annually on progress made. Principle 3 commits member companies to uphold fundamental human rights and to respect cultures, customs and values in dealings with employees and others affected by their activities.[466] The ICMM enters into strategic partnerships with other stakeholders.

9.7 Evaluating MSIs and their impacts

Whereas policy-makers have actively promoted MSIs, in line with a paradigmatic shift from "government to governance"[467], this, according to one collective view, "...does not mean that they are necessarily the better way to govern".[468] Experiences of individual MSIs suggest some successes, but also areas of weakness. Impact assessments of MSIs are rare; so far, those undertaken have mostly studied the effectiveness of internal governance and processes for ensuring compliance, rather than ultimate benefits for rights-holders.

An assessment by the Ethical Trading Initiative (ETI) of members' implementation of the ETI Code demonstrates the challenges of evaluation.[469] The ETI's study was conducted over three years; undertook five case studies to trace impacts through the supply chains across a sample of eleven ETI

463. "About Us", ASEAN CSR Network, http://www.asean-csr-network.org/c/about-us/asean-csr-network.
464. "About the Equator Principles", Equator Principles, http://www.equator-principles.com/index.php/about-ep/about-ep.
465. "About Us", International Council on Mining & Metals, http://www.icmm.com/about-us/about-us.
466. "10 Principles", International Council on Mining & Metals, http://www.icmm.com/our-work/sustainable-development-framework/10-principles.
467. Bop Jessop, "The Rise of Governance and the Risks of Failure: The Case of Economic Development", International Social Science Journal 50 (1998).
468. The World Bank, Increasing the effectiveness of multi-stakeholder initiatives through active collaboration (Wilton Park Conference Report: 2014), https://www.wiltonpark.org.uk/wp-content/uploads/WP1314-Report1.pdf.
469. Stephanie Barrientos and Sally Smith, The ETI Code of Labour Practice: Do workers really benefit? Report on the ETI Impact Assessment 2006 (Institute of Development Studies, University of Sussex, 2006), http://www.ethicaltrade.org/sites/default/files/resources/Impact%20assessment%20summary.pdf.

members[470]; collected qualitative and quantitative information from all key stakeholders, including retailers and brands, agents, factory and farm managers, trade union and non-governmental organisations at international and national levels and workers; and interviewed over 400 workers from 23 supply sites, including men and women, and migrant and contract workers as well as permanent workers. Even then, the evaluation team drew attention to the limitations of the methodology, pointing out that ETI member companies source from tens of thousands of suppliers in over 100 countries, so that studying a representative sample of the supply base was impossible. The team also noted the possible bias towards more progressive suppliers in the selection process. Amongst the conclusions, the study found some improvements to working conditions, mostly in the areas of health and safety, child labour, reduction in regular and overtime hours, minimum wage, meeting State insurance and pension requirements; however, these results varied across sectors. Serious non-compliances persisted with regard to freedom of association, discrimination, regular employment and harsh treatment, and benefits of implementation of the ETI Code were found mainly to accrue to permanent, rather than contract or migrant workers, while there was little reduction in gender-based discrimination. More positively, management awareness and compliance with legislation at assessed sites increased significantly.

A scarcity of empirically-based studies of this kind leaves the ground open for an ongoing debate about MSIs with a broad spectrum of views on almost every point of contention. Proponents urge that a proliferation of governance mechanisms including MSIs brings the benefits of pluralism: different types of rule-making and increased rule-making capacity can mean thicker protection for human rights.[471] Where MSIs provide a well-designed grievance mechanism, this may respond to the needs and interests of rights-holders more efficiently, accessibly and sensitively than State-based formal remedial processes[472] which may be too inflexible to achieve sound, rights-compliant solutions, especially where abuses derive from complex socio-economic situations. As an example, where child labour is revealed in a supply-chain, a mediation-based grievance mechanism provided by an MSI can take account of the reasons why children are being employed in reaching a resolution, while a court case may not. Sceptics, on the other side, question the scope for MSIs, in reality, to ensure access to justice, adequate, open and just remedies, especially for the disenfranchised.[473]

Certainly there remain live questions about the accountability of MSIs to rights-holders, and the impacts on MSIs of pre-existing power imbalances between rights-holders or victims and companies, on one hand, and on whether MSIs exacerbate or mitigate such asymmetries. The relative merit of a voluntary approach over formal regulation backed by law is another contentious issue, and concern has been expressed that MSIs encourage States to renege on their own duties to protect. On one view, MSIs should only come into play in the event of an actual governance failure, such as the inability to pass or enforce standards.[474] Where MSIs assume that there is a "business case" for compliance with human rights this is also problematic: whilst on one level this makes sense, in terms of seeking alignment with corporate mandates, what happens when the business case cannot be made?

On the basis of a survey of MSIs across the sustainability, environmental and human rights fields, Abbott and Snidal conclude there is a significant orchestration deficit,[475] resulting in a "a patchwork

470. The three country studies were in South Africa (fruit), Vietnam (garments and footwear) and India (garments). The two company studies concerned a UK company's horticultural supply chain and Costa Rican bananas.
471. Martijn W. Scheltema, "Does CSR Need More (effective) Private Regulation in the Future?" in Sam Muller, Stavros Zouridis Morly Frishman and Laura Kistemaker (eds.), The Law of the future and the future of law: Volume II (The Hague: Torkel Opsahl Academic EPublisher, 2012).
472. Caroline Rees, "Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges", Corporate Social Responsibility Initiative Working Paper (2010), http://ebooks.narotama.ac.id/files/Berkeley%202010-2011%20(pdf)/Mediation%20in%20Business-Related%20Human%20Rights%20Disputes%20%20Objections,%20Opportunities%20and%20Challenges.pdf
473. Surya Deva, Regulating Corporate Human Rights Violations (New York: Routledge, 2012).
474. Jonas Moberg and Eddie Rich, "Governance of the last resort? — When to consider a multi-stakeholder approach", Extractive Industries Transparency Initiative (21 May 2014), https://eiti.org/blog/governance-last-resort-when-consider-multi-stakeholder-approach. The authors reflect upon their experiences of leading the EITI.
475. Kenneth W. Abbott and Duncan Snidal, "Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit", Vanderbilt Journal of Transnational Law 42 (2009).

of uncoordinated schemes competing vigorously for adherents, resources, legitimacy, and public notice."[476] They suggest that international organisations can, and should, provide the missing "orchestration" by engaging intermediaries and leveraging their combined capacities.

Scant attention has so far been given to the longer-term implications of MSIs on norms, practices and expectations of human rights more generally. MSIs pluralise human rights protection at the municipal level by introducing, into traditionally public terrain, alternative private fora for determining applicable human rights norms and standards and for adjudicating or mediating disputes arising in connection with corporate-related rights abuses. This seems likely to trigger changes to human rights discourse and praxis, whose consequences should be tracked. As one commentator notes, "MSIs entail opportunity costs as their processes may substitute for other avenues of pursuing change, such as efforts to mobilise democratising citizens' movements or to create broader collations of pro-reform actors across multiple scales of governance...."[477] It is important, then, to consider the role of MSIs within the whole ecosystem of human rights protection. To this end, the idea of creating joint learning platforms of communities of practice for those who run and participate in MSIs, though valuable seems incomplete: the discussion needs to be extended to include actors and observers also from "traditional" rights institutions.[478]

SECTION IV: BUSINESS AND HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

By providing a global framework regarding the human rights duties and obligations of States and business, the GPs embody important progress. Steps taken to operationalise the GPs have encouraged innovation by government actors, the corporate sector, amongst CSOs, labour unions and NHRIs and other institutions. Yet change on the ground is slow and partial, and severe business-related human rights abuses remain endemic across industry sectors across Asia and Europe. Although it is too early to draw conclusions regarding the impact of the GPs and other current approaches to this persistent problem, it would be prudent to remain alert as to whether these are "fit for purpose" to deal with further complex problems associated with sustainable development including climate change and vaulting inequality.[479]

Transnational corporations today are powerful, dynamic, networked entities which control and dispose of vast natural and social wealth. They continue to be formally driven by the distinctly "private" principles of profit and shareholder value, but lack mechanisms of democratic accountability. This state of affairs has substantially challenged the pursuit of socially and environmentally sustainable economies. The profile of human rights in the quest to redress the balance has arguably not been as high as is required. Recognising this deficit, the rhetoric of the "post-2015" agenda seeks to centralise human rights within the forthcoming Sustainable Development Goals to be adopted by the UN General Assembly in September 2015.[480]

476. Kenneth W. Abbott and Duncan Snidal, "Taking Responsive Regulation Transnational: Strategies for International Organizations' Regulation and Governance 7 (2013), 95–113. See also John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights", Global Governance 20 (2014).
477. Mariette Van Huijstee, Multistakeholder Initiatives: A strategic guide for civil society organizations.
478. The World Bank, Increasing the effectiveness of multi-stakeholder initiatives through active collaboration.
479. Oxfam International, Working for the few. Political capture and economic inequality, (Oxfam Briefing Paper 178, 2014), http://www.oxfam.org/sites/www.oxfam.org/files/bp-working-for-few-political-capture-economic-inequality-200114-en.pdf.
480. The World We Want 2015, a platform created by the United Nations and civil society to amplify peoples voices in the Post-2015 Agenda held national, global and thematic consultations, the summary of which called for "a new agenda built on human rights, and universal values of equality, justice and security." It also emphasised the central importance of empowerment and participation, gender responsive and rights based governance, human rights accountability and monitoring (including corporate accountability) and access to justice: The World We Want, Global Thematic Consultation on Governance and the post-2015 development framework (2013), http://www.worldwewant2015.org/governance/finalreport; See also UN System Task Team on the post-2015 development agenda, Towards freedom from fear and want: human rights in the post-2015 agenda, (Office of the High Commissioner for Human Rights, 2012), http://www.un.org/millenniumgoals/pdf/Think%20Pieces/9_human_rights.pdf.

The Millennium Development Goals (MDGs) emphasised the vital role and positive contributions of the private sector but paid scant attention to the negative impacts of business activity upon human rights, poverty and the environment with regard to achieving the goals.[481] It seems that some attempt is being made to rectify this imbalance in the SDGs.[482] The UN System Task Team for example calls for businesses to be accountable to the public, especially for the management of public goods and services, highlighting particularly the importance of including the GPs as part of the normative, policy and accountability framework for the private sector in connection with the post-2015 agenda.[483] Pinpointing the need "to realign the power relationships between corporations, states and communities at the country level and to shift the power dynamics at the multilateral level so that the rich and the strong are no longer privileged at the expense of the poor and the marginalised…", it has vouched that such a human-rights based framework would grant people "… the right to decide for themselves how natural resources should be utilised, without having to contend with the monopolies of a few powerful companies or leaders." NHRIs and civil society groups are strongly calling for the same.[484] The EU has also stated its commitment to ensure "inclusion of a rights-based approach, encompassing all human rights, and gender equality, in the post-2015 agenda".[485]

The challenge of appropriately positioning the role of the private sector within the sustainable development agenda equally and importantly touches upon how the State prioritises human rights in attaining sustainable development and how it positions itself within the business and human rights regulatory regime. This paper highlights increasing efforts by States to fulfil their duty to protect against business-related human rights abuses pointing to examples across Asia and Europe. Yet, it is clear that in too many instances, weaknesses in the rule of law, fragile human rights cultures and reluctance to regulate corporate power are still leaving individuals and communities vulnerable to business-related human rights abuses and without meaningful remedy, despite the existence of other regulatory mechanisms provided by corporate self-regulation or MSIs.

This 14th ASEM Seminar on Business and Human Rights provides a unique opportunity to reflect on what steps are needed at regional and national levels to bring effective human rights accountability to the business sector in ways that achieve a common vision of human-centred and sustainable development. It is important to critically evaluate the progress to date, taking a careful and honest look at both the successes and failures. In doing so, it is important to remember that the GPs did not emerge in a vacuum. Rather, they epitomise decades of struggle by labour, communities, human rights defenders, and CSOs, in Asia and Europe, as well as human rights principles and discourse transacted by experts and institutions, regionally and internationally. By the same token however, the challenges demand transformative rather than incremental change if our future economic development is to unfold in a human rights-compatible and human rights-promoting way. A step-change in political will is required of governments in implementing effective systems for protections against business-related human rights abuses and ensuring this is mirrored within policy-making in multilateral forums, including in the realm of trade and investment. Equally, business needs to approach its due diligence obligations with a clear and unequivocal imperative to respect human rights through their core business operations and practices and across their value-chains.

481. Penny Fowler and Sumi Dhanarajan, Business and the Millennium Development Goals: Your Call to Action (Oxfam Policy and Practice, 2008).
482. Lou Pingeot, Corporate Influence in the Post-2015 Process (Bischöfliches Hilfswerk MISEREOR e.V, Brot für die Welt, Global Policy Forum, 2014), https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_influence_in_the_Post-2015_process_web.pdf.
483. UN System Task Team on the post-2015 development agenda, Towards freedom from fear and want: human rights in the post-2015 agenda.
484. See, for example, Mabedle Lourence Mushwana, Re: National Human Rights Institutions and the Post-2015 Development Agenda, Ref: 19/2/4 (13 October 2014), http://www.humanrights.dk/files/media/dokumenter/business/icc_chairperson_letter_on_sdg_15102014.pdf.
485. European Council, Conclusions on EU priorities at the UN Human Rights Fora (10 Feb 2014), http://eu-un.europa.eu/articles/en/article_14578_en.htm.

APPLYING THE UNITED NATIONS' GUIDING PRINCIPLES IN ASIA AND EUROPE: KEY TAKEAWAYS

Bengt JOHANNSON, CSR Ambassador for Sweden

(Concluding remarks delivered at the closing plenary of the 14th Informal ASEM Seminar on Human Rights)

Ladies and Gentlemen,

We have had useful discussions as today's wrapping up session has shown. There have been a number of useful recommendations for our future work. May I take this opportunity to highlight a few conclusions I have made for myself:

1. The UN Guiding Principles on Business and Human Rights are fully accepted by governments, CSOs, National Human Rights Institutes (NHRIs) and the business community. I have not heard any comment saying that the UNGP is the wrong approach.

2. I have also noticed that we have managed to have an equal representation from Europe and Asia. This is of course a basic condition for a balanced discussion.

3. The conference has had a large and active representation by governments, CSOs and NHRIs but only a limited participation by companies. The same goes for the UN meeting in Geneva in December 2013. This is a problem and until we have solved it we need to bear it in mind. On national level I am sure the issue is easier to handle.

4. I noted with interest that the issue of trust was mentioned today. From my Nordic perspective this is an important issue. We are proud of having built up a society where trust is an important element. This has important consequences for relations between government and business. If we trust each other there will also be a different mix of hard and soft law.

5. It was mentioned today that Europa has a CSR baggage of voluntary policy and Asia has a CSR baggage of charity. I feel this image is a bit over-simplistic and needs to be depicted with many nuances. Europe has complemented the reliance on companies' own efforts with a number of legislative initiatives. The EU directive on non-financial reporting being just one. Asia has also moved away from charity in many respects but there are moments when we all recognised that companies have obligation to assist weak societies.

6. The National Action Plans has during the discussions been seen as a way to pick up all the proposals and process them through a multi-stakeholder dialogue. The initiative by Netherlands to present its NAP later today is a good example. Even if there are few NAPs published today many countries such as my own are working on them and I foresee that we will have a harvest period next year.

7. The issue of coherence in government administration has been highlighted. The diverging views of different ministries seem to plague any countries. Also here the NAP process is an instrument that presents a convenient opportunity to square off such differences.

8. I have noted many useful additional comments on aspects such as education, capacity building, SMEs, how to do a human rights impact assessment.

PROFITS, PLANET AND PEOPLE: MAKING SENSE OF THE DUTIES AND RESPONSIBILITIES OF ALL STAKEHOLDERS

Frédéric TIBERGHIEN, Technical Coordinator & Representative of the Ministry of Foreign Affairs, France, & State Counsellor - Conseil d'Etat

(Concluding remarks delivered at the closing plenary of the 14th Informal ASEM Seminar on Human Rights)

Ladies and Gentlemen,

As we come to the end of the 14th Informal ASEM Seminar on Human Rights, I would like to thank you - my fellow colleagues and participants - for your contributions to the Seminar. When I reflect over the discussions of the past three days, I realise that there were many thematic concerns on the topic of 'human rights and businesses' to which we sought answers. These main thematic areas can be distilled into distinct questions:

1. Which human rights are businesses concerned with?

It is very useful to begin with a brief cataloguing of those rights that are affected by business activities, particularly if we want to define the notion of "sphere of influence" and focus on the details of how the private sector is involved in the promotion and protection of human rights. We know that business has influence over:

1. civil and political rights – such as the right to life; the right to freedom and security of the person; the right to be protected from torture; the right to privacy; the right to freedom of opinion and of expression; the right to seek, receive and impart information; and the freedom of association.

2. economic, social and cultural rights – rights protecting the individual against forced labour, child labour; the right to health, to a decent or adequate standard of living, education, vocational training; and a right to a healthy environment.

Business also affects the rights of particular groups such as women, children, employees and their trade union representatives, indigenous people, migrant workers and their families, and people with disabilities.

While it has been acknowledged that these rights do lie within the sphere of influence of the private sector, we also noted that the latter have limited scope to address these rights directly because business is not in charge of protecting these rights: States have the main responsibility for the protection and promotion of human rights. And of course, other rights rely completely on States such as voting rights or civil rights.

2. What is the content of the available toolbox for business to promote human rights?

Ten tools were identified in the Seminar which provide a useful framework for how businesses can improve their effect on human rights:

1. **Adherence to a CSR framework** – there are numerous CSR frameworks available; some are global such as the United Nations Global Compact, others are sectoral (such as textile, or tourism industry related); some are compulsory, others are voluntary such as the UN Guiding Principles. Businesses can be demanded to declare what frameworks they follow and adhere to.

2. **Supply chain management** – It is a response to a new acceptance of the firm or corporation: the networked corporation. It is also a means to enlarge human rights concern among SMEs and suppliers or subcontractors. Codes of conduct between suppliers and businesses should be encouraged and verified: social audits should be conducted in the suppliers' factories.

3. **Management tools** – Management standards such as the AA 1000, the SA 8000, the ISO 14001, the ISO 26000 or ISO 31000 can be adopted by business to improve its performance.

4. **Compliance mechanisms and control** – Frameworks and standards are effective if and only if they are accompanied with compliance and verification mechanisms, preferably by independent third parties.

5. **Reporting and due diligence** – CSR reporting is already practiced by many businesses especially with sustainability reporting. International frameworks such the GRI already exist and human rights assessments can be similarly conducted. But there was an emphasis during our discussions that there is not yet an accepted framework on human rights reporting.

6. **Non-financial ratings** – There are a lot of agencies who conduct on demand, non-financial ratings based on companies' social and environmental performance. Although not fully discussed, the influence of non-financial ratings, provided they are made public, on corporate behaviour should be explored further. I refer, on that topic, to the theory on "the reputational effect" or on "the licence to operate".

7. **Stakeholder engagement** – We have already examples of engagement by companies with their stakeholders. They should not be limited to their investors and shareholders but should also include those in the community who are affected by their activities

8. **Stakeholder dialogue** – It can be divided into two dialogues. The first one, the social dialogue between employers and employees, is well known. In international firms, it can be enhanced by the creation of a social body regrouping the representatives of all the employees: it is the role of the framework agreements. The dialogue with civil society actors (consumers, NGOs, community organisations etc), the "civil dialogue", is a more recent concern and is not yet well organised by business.

9. **The leverage on States** – Corporate codes of conduct can also provide a leverage to improve State and business behaviour in HR. The background paper identified how in the 1970s the Sullivan principles, the first code of conduct in business, forced South African companies to review their conduct to follow non-discriminatory policies, contrary to the South African apartheid system's job reservation act, which was abolished in 1979 thanks to the pressure of US firms.

10. **National Action Plans**

The toolbox is already well furnished and it belongs to business to use all these tools to improve the HR implementation.

3. What is the contribution of business to human rights implementation?

There has been a mixed reaction to this, both positive and negative.

On the negative side, some corporations are distrusted and criticized for their behaviour (eg, the use of tax havens and for committing fiscal fraud). There are also many known examples of the harmful practices conducted by mining and extractive companies, private security firms, and investment banks. Some companies are also engaged in activities which represent a threat for public health such as the tobacco or alcohol industry, the car industry, the nuclear industry (with the waste management problem). Some businesses have had quite a negative impact on labour issues such as a cheap labour framework and bad working conditions (for example, the sub-contracting in the textile sector by major retailers).

On the positive contribution of businesses to human rights implementation, we now see a greater implementation of the environment rules and standards from their home countries in the business operations of multinational companies, even if these are not compulsory in the country of operations. Multinational companies also often offer better working wages and better working conditions, which exert a "traction effect" on the domestic firms.

So there is a mixed judgement on this. If we were teachers evaluating their pupils we would conclude "can do better or much better". On that basis, some activists recommend the "name and shame" approach, in order to praise or to blame the best and the worse contributions of business to sustainable development in general and to human rights in particular. At this stage, let us conclude that business is both the problem and the solution.

4. Why is the contribution of business to sustainable development and human rights so controversial?

Five factors have to be taken into account to answer this question.

First of all, one has to consider the externalities problem – According to his 1957 article, 'Political economy of gratuity'[1] – Bertrand de Jouvenel, one of those who invented the prospective science, companies or plants produce divisible goods but also indivisible harms which have a deep influence on society. The danger for us is to look only at the goods or at the harms and to forget they are closely linked. The first step of a socially responsible company is to publicly acknowledge that its activities can produce harms and that, when they do so, they are responsible for it. It is critical for certain sectors such as the extractive industries, and the banking sector.

Secondly, for many firms, the origin of their CSR behaviour lies in the consequence of a scandal, a crisis, a disaster or a discrimination they provoked or were involved in. The background paper mentions also the resistance against abuses or violations of human rights by business or the fighting of peoples or of minorities for their human rights. If monetary compensation has often been used to make amends for these disasters or scandals, the very concept of CSR has been a result of people protesting against this aspect of business behaviour.

Thirdly, we are not all in agreement about the role of business in society. Following Winston Churchill, some view private enterprise as a "predatory target to the shot", some as a "cow to be milked" and too few as a "horse pulling the wagon". Those who consider firms as a "predatory target to be shot" want to limit the role and influence of business in society because it is deemed to be mainly negative. Those who consider corporations as "a cow to be milked" want to develop its role in order to extract the maximum wealth from it (be it a shareholder through profits, an employee through wages or the State through taxes). Those who consider firms as pulling the wagon recognise the private sector's potential to contribute more than just financial profits, wages and taxes to society. They try to encourage entrepreneurs and corporations and favour what we generally call a "pro-business legislation". They also encourage enterprises and corporations to enlarge their sphere of responsibilities well beyond their economical ones, in environmental and social spheres but also in education and training, in the cultural sphere.

Fourthly, what is the nature of the firm? You may recall Ronald H Coase's influential article of 1937 'the nature of the firm'[2], which was one of the early reflections on the importance of corporate governance issues. Reflecting on that piece together with our discussions, we have to recognise two different approaches of the firm do exist. Some consider that the firm derives its existence from a free contract (with employees, clients and shareholders) and it has a contractual nature, independently from society and State. In this approach, the role of the marketplace is unlimited and the role of

1. Arcadie. Essais sur le mieux-vivre (Paris, Gallimard, coll. Tel), fistly published in1968 by SÉDÉIS (Société d'étude et de documentation économique, industrielle et sociale) in Futuribles.
2. Economica, New Series, Vol. 4, No. 16. (Nov., 1937), pp. 386-405.

States is limited; and the freedom of business is a fundamental right, which has to be combined with the human rights (I refer on this to Brice Lalonde's keynote speech). In this contractual approach, CSR is a voluntary behaviour of the firm and assimilated to a kind of philanthropy.

Others think that the firm does not exist by itself but only by law (and thus by society) which allocates it a sphere of action, defines the role and the limits of the marketplace and the main rules the firm has to comply with. In this institutional approach of the firm, CSR is regulated by law and compulsory: the "licence to operate" delivered to the firm, implicitly or explicitly by society or by the State, is revocable at any moment.

Fifthly, there is no common agreement on the goals of the firm. Some of us may agree with Milton Friedman who famously said there is one and only one social responsibility of business: to use it resources and engage in activities designed to increase its profits. The performance of the firm has to be measured with a simple bottom line, the 'profit and loss' one.

Others disagree with this and assert that the goal of the firm is to maximize its added value for all the stakeholders. The performance of the firm has to be measured in that case with a triple bottom line (profit, planet and people to be short). It is the stakeholder's value theory.

Finally, with so many diverse views on the nature, the role and the goals of the firm, it is no surprise we did not reach a total consensus on business and human rights.

5. How can the behaviour of firms be regulated?

Here again, there are different views on the available means to achieve this.

1. **Self-regulation**– Companies can regulate themselves through the enacting of codes of ethics or of conduct. It is the preferred mean of regulation in the contractual approach of the nature of the firm. But self-regulation is often deemed insufficient and has a low effectiveness due to the lack of external control.

2. **Co-regulation** – Company behaviour can be regulated through negotiations with stakeholders. In the stakeholder's value theory, the firm has to answer to the expectations of all its stakeholders and dialogue with them allows it to determine the frameworks to adopt in order to meet these expectations. MSIs reflect the results of this permanent negotiating process. We find them for example in the Equator Principles, the EITI and the Kimberly Process. Mainly, these frameworks are sectoral: their ambition is to solve the issues encountered in a specific economical sector.

3. **Domestic laws** – Some countries have adopted laws regulating corporate behaviour in different respects. The adoption of such laws can be indicative of a sign of distrust towards companies but is also consistent with the institutional approach of the firm. Progress is dictated by law imposing the domestic vision on the role of the firm. The difficulty for international corporations is to be subjected to different laws in different countries for the same activity, for example in sustainable reporting. So they prefer regional or international standards.

4. **Adherence to international standards** – Corporations have no legitimacy to design or redesign the content of human rights. Human rights are defined by international instruments negotiated by States. And interestingly enough, the content of most of the CSR frameworks is directly derived from all the major international conventions signed after world war II: the 1998 ILO Declaration encapsulating the fundamental rights of labour (ILO n° 87 on freedom of unionization, n° 98 on collective bargaining, n° 25 and 109 on forced labour, n° 100 on equal pay, n° 111 on discrimination in labour, n° 138 on the minimum age for work, n° 182 on children labour); the environmental conventions adopted after the Rio Summit of 1992, the 1948 Universal Declaration of Human Rights (UDHR) and the specific conventions adopted afterwards (The two 1966 covenants, the conventions on the rights of women, or on the rights of the

child, amongst others). The Preamble of the UDHR mentions that all organs of society concur to the implementation of human rights. And business is one of these organs of society. And it is the reason why the adherence of firms to CSR frameworks recalling the rights encapsulated in international treaties has to be encouraged or imposed.

6. What is the respective role of hard law and soft law?

Be it 'minimum wages', 'minimum age', 'minimum vocational training' in social law, 'maximum effluents rejections' or emissions in environmental law: hard law most often deals in terms of 'minimum' and 'maximum'. Soft law is more ambitious: it goes beyond minimum or maximum standards and gives firms the opportunity to go further than the minimum or the maximum enacted by law.

The UN Guiding Principles are considered soft law as, following J. Ruggie's declarations, they do not create any new obligations. They were adopted as a fall-back position after an international treaty on the responsibility of corporations, promoted by the sub-commission of human rights of the UN, had been clearly rejected in 2003 by northern States and businesses. So we have to live provisionally with a soft law standard, the only one that was reachable.

The danger of soft law is the risk of privatisation of law but this danger is strictly contained if the soft law instruments reflect themselves, as we just saw, the international agreed standards, as it is the case with the UNGP and many other standards.

One of the main features of CSR is precisely this one: the dynamics of CSR relies on two legs or on the combination between hard law and soft law, between compulsory standards (for example the domestic laws of each country) and voluntary principles and standards. And everybody knows that the soft law of today may become the hard law of tomorrow. And soft law is also generating rights and obligations: let us recall the Casky v. Coca Cola case in the Federal court of California in 2002. Or the mere fact that a code of conduct attached to a labour contract or a supplier contract can give birth to rights and obligations.

7. What is the role of international law in CSR regulations?

International treaties belong to hard law and they impose only minimum standards for States: the lowest common denominator. But it is becoming longer and longer and more and more difficult to negotiate international conventions: they are nowadays nearly 200 States against 45 in 1945.
Like M.L. King, I made a dream about an international treaty on the responsibility of corporations. But what do we do until such a treaty is possible and adopted? Do we wait or do we move forward?

More importantly we have to consider if this treaty would not be too little, too late? Using the current climate change negotiations and the right to a healthy environment as an example, States may try as much as they can but the outcomes are usually insufficient compared to expectations: in reducing carbon emissions, experience has demonstrated that many of the innovations that have helped countries move towards their intended reduction levels have been market driven or local authorities driven.

Should we rely only on States and on their commitments, we will probably never reach the target. I believe that if we were to reach our targets, it would be thanks to all stakeholders and to business in particular.

In the human rights field, we have a similar situation: if States are the duty bearers, the convergence of efforts by all organs of society is necessary to reach the target of human rights implementation. So business is the problem but also a contributor to the solution. And until an international treaty defines their duties in human rights, business has to be enlisted as far as possible.

8. Is CSR a sign of new business models, of a new culture and/or of a new model of international governance?

Behind the debate about the role of corporations in society and their contribution to a sustainable development, new business models are emerging. Some firms are considering "bottom of the pyramid models", focusing on the social inclusion of the poor. Social entrepreneurs are creating new ventures searching first for social impact, ahead of financial results. Impact investing is also a growing concern in finance.

There are also signs of a cultural shift in corporate behaviour: more and more companies acknowledge that human rights are a concern that needs to be incorporated into CSR strategies. Increasingly conflict resolution is done through negotiation and engagement with stakeholders and civil society organisations. We could term it as an end to the culture of impunity with civil society actors demanding transparency and accountability in business activities (remedy harm, control of risks and sanction against human rights violations).

In terms of governance model, the growth of MSIs is indicative of the emergence of de-centralised governance patterns and the realisation that the future belongs to alliances between stakeholders (corporations, NGOs, trade unions, local authorities etc). Governments are more and more short-term minded while planetary challenges require long-term minded decision makers. Open multi-stakeholders alliances is also a way to promote long-term solutions. Referring to Brice Lalonde's speech, we could be leaving what we called the Westphalian era, the one during which States were the sole actors in international relations.

9. Is the CSR agenda the same in Europe and in Asia?

The background paper (section 4.4) has listed the human rights challenges in Asia but did not give an equivalent list for Europe. Europe has also its own challenges, according to our main rapporteurs: environment protection and the fight against discriminations on the labour market (gender equality; part-time workers; safety at work; harassment, amongst others).

CSR priorities vary from region to region but should it be considered a pity that Asia and Europe do not have the same agenda?

It should not be considered so because CSR is aimed at bringing solutions to real problems in different societies, in specific sectors of economy. No one size fits all: we need different action plans to answer to the expectations expressed by the stakeholders. Priorities are to be defined through the dialogue with stakeholders and the action plans can be very different from one country to another, from one company to another. Anyway, it is time to act. Experts note the proximity between CSR and quality management: following the Deming wheel, a responsible corporation has to plan, do, check and act or adjust. As in human rights, the implementation is critical.

10. Is there a danger in taking a risk management approach for business and human rights?

One entrance door into CSR is the risk approach. When the UK considered encouraging business to adopt a CSR policy, the Department of Trade and Industry issued a directive in 2000, obliging listed companies to mention in their annual report the material risks created by their activities. CSR is the answer to these risks: the company has to identify them, to disclose them and to put in place action plans to minimise or eliminate them, for example in the supply chain.

However, the risk approach is not relevant in human rights. Any violation of human rights is unacceptable and a zero risk approach has to prevail in human rights: no violation of human rights is tolerated from States or from corporations.

11. On which forces to rely on in order to promote human rights in business?

The development of a strong CSR commitment in business requires a strong civil society and its empowerment from the State.

We mentioned, among the necessary actors are the trade unions, the NGOs, the activists and the HR defenders, the media, the education system, the NHRIs. As we dedicated some of our discussion to them already, I would add the consumers and clients organisations which are a counter-power vis-à-vis corporations. Labels play an important role in informing the consumers about the adherence of companies to CSR frameworks. We must forget neither the investors nor the representatives of the savers: as social responsible investment is a growing trend on the financial markets, they are voting in the annual meetings and negotiate engagements from the managers of listed companies. In that respect, the development by companies of a civil dialogue besides the social dialogue is also critical to CSR development.

12. What are the State's duties?

The State is the only entity that has to ensure that business violations of human rights are not tolerated. Our discussions have recalled that:

1. States are the ultimate duty-bearers for human rights obligations.
2. With regard to business and human rights, States also have specific duties as a public sector employer, a purchaser (public procurement), an investor and fund manager (public participations in companies), an insurer (pension funds management and credit for exports).
3. States should adopt business and human rights legislation consistent with international standards.
4. It is vital for States to organise the remedies –both judicial and non-judicial – to protect human rights defenders and whistle blowers.
5. Education plays an important role in human rights protection, in HR public awareness and in HR violations prevention.
6. States need to tackle corruption at all levels.
7. Trade and investment agreements should address and include labour and environmental standards.
8. States must allocate more responsibilities to civil society and social partners, knowing that social progress requires a social sphere independent from the political sphere and governed by the negotiations between employers and employees.
9. States should harmonise their political decision processes with scientific findings and technological impact assessments.
10. National Action Plans on human rights and business should be adopted and implemented.

If CSR requires a strong civil society, it also requires a strong State, able to take decisions and to avoid human rights violations.

On this note, I would like to observe that all players and actors have a long list of duties to perform. We go back home and have a long list of things to do.

ANNEX 1: LIST OF ACRONYMS

ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
ASEM	Asia-Europe Meeting
ATS	The US Alien Tort Statute
BIT	Bilateral Investment Treaty
BRICS	Brazil, Russia, India, China and South Africa
CDDH	Council of Europe Steering Committee on Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
CIA	Central Intelligence Agency
CoE	Council of Europe
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DIHR	Danish Institute for Human Rights
ECA	Export Credit Agencies
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EGAT	Electricity Generating Authority of Thailand
EICC	Electronic Industry Citizenship Coalition
ETI	Ethical Trading Initiative
EITI	Extractive Industry Transparency Initiative
EO	Executive Order
EP	Equator Principles
ESC	European Social Charter
ESG	Environmental, social and corporate governance
EU	European Union
FDI	Foreign Direct Investment
FLA	Fair Labor Association
FLEGT	EU Forest Law Enforcement, Governance and Trade Scheme
FSA	Financial Services Authority
FSC	Forest Stewardship Council
GBI	Global Business Initiative on Human Rights

GDP	Gross Domestic Product
GNI	Global Network Initiative
GP	United Nations Guiding Principles on Business and Human Rights
GRI	Global Reporting Initiative
HCP	High Contracting Party
HRBA	Human Rights-Based Approach to Development
HRD	Human Rights Defenders
HRIA	Human Rights Impact Assessment
HRIAM	Human Rights Impact Assessment and Management
ICAR	International Corporate Accountability Roundtable
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICGLR	International Conference of the Great Lakes Region
ICMM	International Council for Mining and Metals
ICT	Information and Communications Technologies
IFC	International Finance Corporation
IFI	International Finance Institution
IGO	Inter-Governmental Organization
ILO	International Labour Organization
ISO	International Organization for Standardization
MCA	Ministry of Corporate Affairs
MNC	Multinational Corporation
MNE	Multinational Enterprise
MSC	Marine Stewardship Council
MSI	Multi-stakeholder Initiative
NAP	National Action Plan
NCP	National Contact Point
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OECD	Organisation for Economic Development and Co-operation
OHCHR	Office of the UN High Commissioner for Human Rights
PIE	Public Interest Entities

RSPO	Roundtable on Sustainable Palmoil
SASAC	State Owned Assets Supervision and Administration Commission
SEC	US Securities and Exchange Commission
SECP	Securities and Exchange Commission of Pakistan
SIA	Sustainability Impact Assessment
SME	Small and medium-sized enterprise
SOE	State-Owned Enterprises
SRI	Socially Responsible Investment
SRSG	UN Special Representative of the Secretary-General
SWIA	Sector Wide Impact Assessment
SZSE	Shenzhen Stock Exchange
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporation
UCC	Union Carbide Corporation
UCIL	Union Carbide India Limited
UDHR	Universal Declaration on Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UNHRC	UN Human Rights Council
UNICEF	United Nations Children's Fund
UNPRI	UN Principles for Responsible Investment
UNWG	UN Working Group on the issue of human rights and transnational corporations and other business enterprises
VPs	Voluntary Principles on Security and Human Rights
WTO	World Trade Organization

ANNEX 2: SEMINAR PROGRAMME

Day 1 – Tuesday, 18 November 2014

Venue: Crowne Plaza West Hanoi

09:00 - 12:30	**Side Event on Human Rights and Businesses: Collective Bargaining** *Organised by the Institute for Human Rights Studies, Institute for Workers and Trade Unions and Chamber of Commerce and Industry, Viet Nam*
	Official Welcome
16:00 – 16:20	**Chair** ZHANG Yan, *Executive Director, Asia-Europe Foundation (ASEF)* **Opening Speech on Behalf of the Host, Socialist Republic of Viet Nam** NGUYEN Thanh Hoa, *Vice Minister of Labour, Invalids and Social Affairs (10 min)* **Opening Speech on Behalf of the Organisers** Jerril G. SANTOS*, Ambassador of the Philippines to Viet Nam (10 min)*
	Opening Plenary
16:20 – 16:50	**Chair** Rolf RING, *Deputy Director, Raoul Wallenberg Institute* **Keynote Address** Brice LALONDE, *Special Advisor on Sustainable Development to the UN Global Compact (15 min)* Elaine TAN, *Executive Director, ASEAN Foundation (15 min)*
16:50 – 17:20	**Joint presentation of Background Paper by Main Rapporteurs** *(30 min)* Claire METHVEN O'BRIEN, *Strategic Advisor, Danish Institute for Human Rights* Sumi DHANARAJAN*, Research Associate, Centre for Asian Legal Studies, National University of Singapore*
19:00 – 20:30	Welcome Dinner (welcome speech by H.E. **HA Kim Ngoc**, Vice Minister of Foreign Affairs, Viet Nam)

Day 2 – Wednesday, 19 November 2014

Venue: Crowne Plaza West Hanoi

Simultaneous Working Groups

09:00 - 18:00

Working Group 1: State Duty to Protect Human Rights Against Violations by Businesses

Moderator: Delphia LIM (Harvard Kaufman Fellow)
Rapporteur: Claire METHVEN O'BRIEN (Danish Institute for Human Rights)

Working Group 2: Corporate Responsibility and its Contribution to Human Rights Implementation

Moderator: Jermyn BROOKS (Transparency International)
Rapporteur: Shahamin ZAMAN (CSR Center)

Working Group 3: Monitoring, Reporting and Access to Remedies

Moderator: Jerome CHAPLIER (European Coalition for Corporate Justice)
Rapporteur: Sumi DHANARAJAN (National University of Singapore)

Working Group 4: Multi-stakeholder Cooperation

Moderator: Maria Elena HERRERA (Asian Institute of Management)
Rapporteur: Karin BUHMANN (Roskilde University and Copenhagen Business School)

Day 3 – Thursday, 20 November 2014

Venue: Crowne Plaza West Hanoi

Closing Plenary

09:30 - 10:30

Rapporteurs' Summary on Each Working Group
Chair: Marine DE CARNÉ, *Ambassador for Bioethics and Corporate Social Responsibility, France*

Working Group 1: State Duty to Protect Human Rights Against Violations by Businesses

Presentation – Claire METHVEN O'BRIEN *(15 min)*

Working Group 2: Corporate Responsibility and its Contribution to Human Rights Implementation

Presentation – Shahamin ZAMAN *(15min)*

Working Group 3: Monitoring, Reporting and Access to Remedies

Presentation – Sumi DHANARAJAN *(15min)*

Working Group 4: Multi-stakeholder Cooperation

Presentation - Karin BUHMANN *(15 min)*

Day 3 – Thursday, 20 November 2014

Venue: Crowne Plaza West Hanoi

10: 50 – 11:40	**Q&A Discussion**
13:00 - 15:00	**Panel Discussion on Protecting Migrants: the Role of the Private Sector** Chair: Thierry SCHWARZ, *Director for Political and Economic Department, Asia-Europe Foundation (ASEF)* • Christopher NG (UNI Global Union) • Viet Anh DUONG (Center for Development and Integration) • Serena LILLYWHITE (Oxfam)
15:00 - 15:30	**Concluding Remarks** Bengt E. JOHANSSON, *Ambassador for Corporate Social Responsibility, Sweden* Frédéric TIBERGHIEN, *Technical Coordinator & Representative of the Ministry of Foreign Affairs, France, & State Counsellor - Conseil d'Etat*
	<**end of programme**>
19:00 – 21:00	**Side-event: National Action Plans on Business and Human Rights** *Organised by the Ministry of Foreign Affairs of the Netherlands and the Danish Institute for Human Rights*

ANNEX 3: CONCEPT PAPER

According to a 2013 Global Trends report, 40 of the world's 100 largest economic entities in 2012 were business corporations[1]. Given their economic clout, the influence of businesses also extends to socio-political issues, and increasingly, their role and accountability in human rights protection and promotion has come under examination.

Under international law, States are the only recognised legal bearers of human rights obligations and consequently only they can be held accountable for human rights violations. However, the preamble of the Universal Declaration of Human Rights calls on "every individual and every organ of society" to promote respect for these rights and to secure their universal and effective recognition and observance[2]. And as Prof. Louis Henkin noted "'Every individual and every organ of society' excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to all of them"[3].

Although discussions on business and human rights in international law can be traced back to the 1980s[4], earnest debate on the topic began when the United Nations Sub-Commission for the Promotion and Protection of Human Rights' working group to study and report on human rights and business[5] produced a report in 2003 titled "Norms on the Responsibilities of Transnational and Other Business Enterprises with Regard to Human Rights" which, although it was never formally endorsed by the UN[6], had significantly positive effects.

First, it promoted a growing consensus that because business firms had the power to affect human rights, they should have direct human rights responsibilities. Second, it resulted in a series of recommendations that eventually led the UN Secretary General to appoint John Ruggie as the 'Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' in 2005, to take up the issue of the human rights responsibilities of transnational corporations and other business enterprises.

In 2008, the UN Human Rights Council (UNHRC) unanimously accepted the Special Representative's proposed 'Protect, Respect and Remedy' policy framework and endorsed it in 2011 as the UN Guiding Principles on Business and Human Rights. In his report, the Special Representative noted that the guiding principles were applicable to all States and to all business enterprises and that "nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights"[7]. The 31 principles rest on three key values: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and greater access by victims to effective remedies[8]. To promote the effective and comprehensive dissemination and implementation of the Guiding Principles, the UNHRC

1. Corporate Clout 2013: Time for Responsible Capitalism, http://www.globaltrends.com/knowledge-center/features/shapers-and-influencers/190-corporate-clout-2013-time-for-responsible-capitalism
2. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), preamble
3. Henkin, Louis, The Universal Declaration at 50 and the Challenge of Global Markets, Brooklyn Journal of International Law, 25:5, 1999, 17-25, page 25
4. See the 1984 draft UN Code of Conduct on Transnational Corporations http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.2000.WG.2.WP.1.Add.2.En
5. The working group was set up in 1998 to study and report on human rights and business.
6. At the core of the 14 norms was the proposal that transnational corporations and other business entities should be brought directly under the ambit of international human rights law, humanitarian law, international labor law, environmental law, anti-corruption law and consumer protection law (Hillmanns 2003: 1070). The Report called for expanding international human rights obligations to include transnational corporations as well. Not surprisingly, the report aroused strident opposition on the part of a significant section of the business community and governments (Arnold 2010).
7. Ruggie, John, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Office of the High Commissioner on Human Rights, 2011
8. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

also established a working group on the issue of human rights and transnational corporations and other business enterprises[9].

STATE DUTY TO PROTECT

Under international human rights treaties, States have the positive responsibility to ensure the rights of all persons under their jurisdiction (or within their territories) are not violated and as such ensure the observance of human rights by all third parties[10]. While States are not held responsible for human rights abuse committed by private enterprises per se, they could be in breach of their international legal obligations "where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse"[11]. However, when it comes to legislation, there is no agreement as to which branch of law should be the test a company's violation of human rights (domestic criminal law; public international law; tort or company law?) and it is not clear if the State's 'duty to protect' includes adjudicating extra-territorial violations of trans-national corporations[12].

In order to provide a conducive environment for human rights, States may promote certain measures to regulate business activities[13]. In the European Union's (EU) 2012 action plan to implement the new EU Strategic Framework on Human Rights and Democracy, Article 25 supports the implementation of the UN Guiding Principles on Business and Human Rights[14]. The EU has plans to improve the functioning of the internal market by seeking transparency and disclosure on human rights aspects (amongst others) by European companies[15].

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9. Furthermore, the UNHRC also set up a Forum on Business and Human Rights (under the Working Group's guidance) to "discuss trends and challenges in the implementation of the Guiding Principles [on Business and Human Rights] and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices." (paragraph 12, UNGA Resolution A/HRC/RES/17/4). UNGA Resolution A/HRC/RES/17/4, available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement.
10. For example, see the Convention for the Elimination of Racial Discrimination; the Convention for the Elimination of Discrimination Against Women; Convention of the Rights of Child and its Optional Protocol (OPSC); Convention on the Rights of People with Disabilities; Convention on the Rights of Migrant Workers
11. Ruggie, John, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Office of the High Commissioner on Human Rights, 2011
12. France, in its 2004 legal reforms, extends criminal liability to all legal entities under French law, including to those crimes committed outside its territories. For more details, see H. Ascensio, 'Extraterritoriality as an Instrument', Contribution to the work of the UN Secretary-General's Special Representative on human rights and transnational corporations and other businesses, available at http://www.univ-paris1.fr/fileadmin/IREDIES/Contributions_en_ligne/H._ASCENSIO/Extraterritoriality__Human_Rights_and_Business_Entreprises.pdf.
    Another example is the American Alien Tort Claims Act, (ATCA) is a federal statute that provides courts with jurisdiction to consider all causes where an alien sues for a tort only in violation of the law of nations or a treaty of which America is a party. Advisory Council of Jurists (ACJ) Reference on Human Rights, Corporate Accountability and Government Responsibility, The 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Kuala Lumpur, 27-31 July 2008 –Part 2: Supplementary Paper
13. For example, in the USA, the Dodd-Frank Act required US-listed companies to disclose payments to governments and other operations. In France, under the Grenelle 2 Act, the government is required to submit a three-yearly report to Parliament on how firms are fulfilling their reporting requirement and on action to "promote corporate social responsibility" taken at national, European and international level. In Indonesia, CSR has been introduced in three laws: the Investment Law (Law No. 25/2007); the Limited Liability Company Law (Law No. 40/2007); and the State-Owned Enterprises Law (Law No. 19/2003). More details available at http://csr-asia.com/csr-asia-weekly-news-detail.php?id=10419. For a comprehensive list of CSR disclosure efforts by national governments and stock exchanges, see http://www.stakeholderforum.org/fileadmin/files/Government%20disclosure%20efforts.pdf
14. Identifying the responsibilities of both the European Commission (EC) and the member states, the action plan called for the EC to prepare human rights guidance for companies in three sectors (oil & gas; information communication technology; and employment & recruitment agencies) and for small and medium-sized enterprises, and to also report on EU priorities for the effective implementation of the Guiding Principles; the plan called for member states to develop national plans for the implementation of the Guiding Principles.
    The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy, document 11855/12 is available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf . The EC's sector-specific human rights guides can be found at http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm
15. Lambrinidis, S. (2013), Keynote Address, UN Forum on Business & Human Rights, Geneva, 4-5 December 2012.

In Southeast Asia, Corporate Social Responsibility (CSR) has been incorporated in the Association of Southeast Asian Nations' (ASEAN's) 2009 Socio-Cultural Community Blueprint as part of its aim to engage the private sector in the development of the ASEAN community[16]. CSR is also included in the ASEAN Intergovernmental Commission on Human Rights' (AICHR's) five-year work plans and is one of the topics on which AICHR will conduct a thematic study - in 2012 it held its first coordination meeting on the topic[17].

State owned or controlled businesses are also subject to the corporate responsibility to respect human rights and often are in the best position to ensure that the relevant policies and guidelines for human rights protection are implemented. Furthermore, when States decide to contract out their public functions to private enterprises, they do not relinquish their international human rights obligations and can be held responsible for a private company's actions – especially when private security firms are hired for detention and immigration services[18]. The 2008 Montreux Document which was finalised by 17 States affirms the obligations and responsibilities of States[19] in relation to private military and security companies. Although not legally binding, the Document provides recommendations and a good practice toolkit to assist States in establishing oversight and control mechanisms over private military and security companies[20].

While the manner in which companies manage their supply chains[21] is also increasingly scrutinised, the ability of States to support (and not just advocate) responsible supply chain management needs to be addressed, especially in the informal sector where work may be sub-contracted to home workers and difficult to monitor for human rights observance[22].

Competitive production costs are also a challenge in relation to responsible supply chain management, especially when it comes to living wages[23]. While anti-competitive business practices, import barriers and domestic subsidies all play their share in distorting price levels, price competitiveness remains a crucial element for financial success of companies. Even though countries may push for better access to markets and fair trade, trade agreements remain sensitive in relation to responsible supply chain management because in order to retain their competitive position, countries have to "balance the desire to provide low production costs with the duty to protect the right of adequate standards of living for workers"[24].

16. See section C.3 "Promoting Corporate Social Responsibility (CSR)" in the ASEAN Socio-Cultural Community Blueprint, available at http://www.asean.org/archive/5187-19.pdf
17. CSR has also been added to the revised work plan (2009-2015) of the Initiative for ASEAN Integration (IAI) which aims to narrow the development divide and enhance ASEAN's competitiveness as a region. In addition to providing training on CSR concepts and their effective implementation, the work plan intends to "Develop and implement a comprehensive program to build capacity of CLMV countries [Cambodia, Laos, Myanmar and Vietnam] for effective implementation of international best practices on corporate social responsibility.
See C3. Promoting Corporate Social Responsibility (CSR), Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009-2015), available at http://aseansummit.mfa.go.th/14/pdf/Outcome_Document/IAI%20Strategic%20Framework%20-%20Work%20Plan%202%20_2009-2015%5B1%5D.pdf
18. Human Rights Committee, Communication No. 1020/2001, 78th session, UN Doc CCPR/C/78/D/1020/2001 (2003)
19. The Montreux Document highlights the responsibilities of 3 types of States - Contracting States (those States that hire private security and military companies), Territorial States (those States on whose territory these companies operate) and Home States (States in which the companies are based).
20. Full text with explanatory notes is available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf
21. The International Chamber of Commerce (ICC) defines supply chain responsibility (ICC 2007:2): "as a voluntary commitment by companies to manage their relationships with suppliers in a responsible way. As a result of their purchasing activities, companies may have some opportunities to influence constructively their suppliers' social and environmental performance… Whatever mechanism is used, the most effective way to achieve sustained improvement over time is through the development of a long-term collaborative relation between corporate buyers and their suppliers, through which suppliers can internalize change by participating in the shaping of social and environmental performance objectives, based on their own perception of their business capacity and needs."
22. This is especially true for child labour. As Opijnen and Oldenziel point out in the context of the EU where abolishment of child labour is high on the political agenda, "the further back in the supply chain the child labour occurs, the more difficult it is to detect by EU-based companies. It remains difficult to monitor and control the practices of entities at the roots of the supply chain, also when companies require suppliers to sign their supplier's code of conduct". Opijnen, Marjon van and Joris Oldenziel 2010: Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies.
23. bid
24. Ibid

While the State's duty to protect is undisputed, achieving policy coherence within and between different state institutions remains to be achieved. As the Special Representative has stated, "[t]he most prevalent cause of legal and policy incoherence is that departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, expert credit and insurance, and trade – typically work in isolation from, and uninformed by, their Government's own human rights obligations and agencies"[25]. Such horizontal policy coherence also needs to be matched by vertical policy coherence[26] between national and international law, particularly to enhance peer learning and to enhance capacity building on these issues at the international level[27].

CORPORATE (SOCIAL) RESPONSIBILITY TO PROTECT

The corporate responsibility to protect human rights is "a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights"[28]. Corporate responsibility has been defined by the European Commission (EC) as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"[29]. In recent years, there have been an increasing number of large multinational companies who have begun to publicly acknowledge responsibility for their corporate actions – reporting on corporate responsibility has increased with about 5,800 reports in 2010 compared to less than 50 in the early 1990s[30].

As part of the efforts to regulate corporate behaviour, there have been many initiatives introduced which provide voluntary codes and industry specific guidelines to promote responsible business practices[31] –the 2002 United Nations Global Compact is one of the best known voluntary frameworks which elaborates 10 principles in human rights, labour, environment and anti-corruption to which participating companies should adhere.

Like the concept of Corporate Social Responsibility (CSR) itself, all these codes and initiatives are evolving; while they do offer several advantages and can be a powerful regulation tool when adopted by companies, they do suffer from their limitations – being voluntary, their adoption cannot be

25. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and human rights: further steps toward the operationalization of the "protect, respect and remedy" framework, United Nations Human Rights Council - A/HRC/14/27, 9 April 2010
26. For more information, see United Nations (2011), Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04
27. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, United Nations Human Rights Council - A/HRC/11/13, 22 April 2009.
28. Ruggie, John, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Office of the High Commissioner on Human Rights, 2011
29. In 2011, the EC published a new policy on Corporate Social Responsibility (CSR) in which it put forward a new, simpler definition of CSR as "the responsibility of enterprises for their impacts on society". In order to meet their responsibilities, enterprises "should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders".
Please see European Commission (2011), 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, COM(2011) 681 final, http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5511
30. Lucci, P (2012), Post-2015 MDGs: What role for business? Overseas Development Institute. As another example, in 2006, there was only one company in China (State Grid) that filed a CSR report. This figure rose to 1,722 companies in 2012. http://www.syntao.com/Uploads/file/%E5%95%86%E9%81%93%E6%99%BA%E6%B1%87%E7%AC%AC%E4%B8%80%E6%9C%9F-%E5%B0%81%E9%9D%A2%E9%93%BE%E6%8E%A5%E7%89%88.pdf
31. For example, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977); ILO Declaration on Fundamental Principles and Rights at Work (1998); OECD Guidelines for Multinational Enterprises (2000); United Nations Global Compact (2000); the Kimberley Process Certification Scheme (2000); The Extractive Industries Transparency Initiative (2002); United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (2003); Voluntary Principles on Security and Human Rights (2007); Equator Principles (2006); International Organization for Standardisation (ISO) certification schemes such as the recent ISO2006

enforced[32]; being sector specific, they have limited application; some may lack formal compliance mechanisms and may have no means to monitor performance.

Very often such initiatives may fail to fully inform or translate the international human rights obligations on which they are based (since international human rights instruments are targeted mainly to States) thereby making the full extension of these obligations to corporations, problematic[33]. Furthermore, their observance by Small and Medium-sized Enterprises (SMEs) is challenging - while these companies have less capacity and more informal management structures, they still can have a severe impact on human rights.

Voluntary codes and initiatives to improve conditions in supply chain management[34] also exist but they too, prove insufficient to deal with transparency and non-compliance with human rights standards in the supply chain. Although all actors in the supply chain are expected to follow the same standards, in practice transparency beyond first tier suppliers is difficult to monitor (especially on issues of child labour and in sectors such as the garment industry where work may be contracted to smaller units). Workers, SMEs or suppliers further down the chain may be disadvantaged by lacking knowledge, funds and access to relevant market information[35].

Non-compliance in supply chains also often takes place in countries where human rights standards are not guaranteed at the national scale or where enforcement remains weak (especially in relation to labour rights, migrant labour, child labour and living wages); in such situations even though reports emerge of companies exploiting weak regulation, their responsibilities towards their human rights obligations do not diminish[36].

The rights of indigenous groups have been protected in international human rights standards (for example, see the UN Declaration on the Rights of Indigenous Peoples and the ILO's convention number 107 and 169) but the focus has been on State responsibilities and not much on the responsibilities of other actors. Nonetheless, many of these standards have relevance to the conduct of business activities, especially for lands traditionally owned or controlled by indigenous groups[37]. Additionally, newer guidelines such as the World Bank's Operational Policy on Indigenous people (OP 4.10), International Financial Corporation's Performance standard PS-7, Convention on Biological Diversity's 2004 Akwé: Kon Guidelines impose responsibilities on corporations to ensure that both domestic and international indigenous standards are being observed before they commence any business activity in an indigenous community. The International Council on Mining and Metals has released a good practice guide for mining companies to address the impact of their activities on indigenous communities[38].

32. This can be particularly challenging for business codes of conduct that call for the respect of cultural rights and non-discriminatory labour practices. In France, the Cultural Diversity Charter (Charte de la Diversité) as signed by over 2000 French companies requires signatories to ensure the promotion and the equitable respect of cultural diversity in their labour force; however, being a non-legal document, compliance is not legally binding on members.
33. Preuss and Brown's study in 2012 shows that just over half (57.1%) of the 98 firms in the FTSE 100 index address human rights in either a separate human rights policy or in another CSR tool, such as a code of conduct or a CSR policy. Notably, almost a third (31.6%) of all firms adopted at least one CSR tool but do not discuss human rights in these. In addition, the content of the human rights policies was also found to be rather shallow, as of the 37 rights in the UN Declaration only six are addressed in half or more of the documents by the FTSE 100 firms. Preuss and Brown (2012), Business policies on human rights: an analysis of their content and prevalence among FTSE 100 firms, Journal of Business Ethics, Sep (I) 2012, Volume: 109 Issue: 3
34. Some of the standards include the SA8000, the Business Social Compliance Initiative (BSCI), FLO Fairtrade Standards, the Ethical Trade Initiative (ETI), the International Council of Toy industries (ICTI), Worldwide Responsible Apparel Production (WRAP), Electronic Industry Code of Conduct (EICC), the international Council on Mining and Metals (ICMM), Fair Wear Foundation (FWF), Worldwide Responsible Apparel Production (WRAP), the Better Cotton Initiative (BCI), the Better Sugar Cane Initiative (BSI), the Workers' Rights Consortium, the Electronic Industry Citizen Coalition, the Rainforest Alliance and Utz Certified
35. Opijnen, Marjon van and Joris Oldenziel 2010: Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies.
36. See, Hahn (2012), Corporate citizenship in developing countries: Conceptualisations of human-rights-based evaluative benchmarks. African Journal of Business Ethics 2012;6:30-38, Available from: http://www.ajobe.org/text.asp?2012/6/1/30/104700
37. See articles 25-29 of the 2007 UN Declaration on the Rights of Indigenous Peoples.
38. See http://www.icmm.com/publications/indigenous-peoples-and-mining-good-practice-guide

International efforts such as the Global Sullivan Principles, the Global Reporting Initiative, and Social Accountability 8000 encourage companies to be transparent in their human rights impact assessment and reporting to their stakeholders and social partners. Due diligence is an important aspect of human rights impact assessment as it encourages companies to undertake regular assessments and include human rights risk assessment into company decision-making. Increasingly there have been calls for policy coherence in business enterprises as well, to link their human rights responsibilities to their wider organisational policies and practices and also for their other business activities[39]. In 2013, the Human Rights Resource Centre for ASEAN, together with Shift and Mazars, launched the Reporting and Assurance Frameworks Initiative (RAFI) which is a global, non-proprietary, initiative to develop public reporting and assurance frameworks based on the UN guiding principles[40].

GREATER ACCESS TO EFFECTIVE REMEDIES

Providing access to remedy is closely tied to State responsibility to protect, reinforced in several international and regional human rights instruments which all emphasise the need for States to "conduct prompt, thorough and fair investigations; provide access to prompt, effective and independent remedial mechanisms, established through judicial, administrative, legislative and other appropriate means, impose appropriate sanctions, including criminalizing conduct and pursuing prosecutions where abuses amount to international crimes; and provide a range of forms of appropriate reparation, such as compensation, restitution, rehabilitation, and changes in relevant laws"[41]. The OECD Guidelines for Multinational Enterprises, provide government-backed standards for responsible conduct for multinational enterprises operating in or from OECD member countries. Although not legally binding, the OECD guidelines are unique in providing a dispute resolution mechanism for investigating and resolving complaints about corporate misconduct[42]; and reach further than just OECD countries with ten additional non-OECD countries adhering to them.

In particular, special attention should be paid to vulnerable groups (including women, young people, indigenous communities and other minorities) to ensure that they have access to remedies and justice. Access to remedy can be provided by establishing State-based grievance mechanisms (judicial and non-judicial[43]) which can be supplemented "by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms" [44]; States should facilitate public awareness and knowledge about such mechanisms and provide support where needed.

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39. For example, the International Integrated Reporting Council (IIRC) is currently working on proposals for an International Integrated Reporting Framework that will link a company's strategy, governance and performance to its social and environmental context, in one report. http://www.theiirc.org/
40. The frameworks developed by RAFI will be "non-proprietary and publicly available to all companies and assurance providers to use in their work. They are intended to be relevant to, and viable for, all companies and auditors/assurance providers in any region, and to dovetail with existing reporting initiatives". Detailed information can be found at http://business-humanrights.org/media/documents/rafi-framing-document-2013.pdf
41. UNHRC (2009), Promotion of all Human Rights, Civil Political, Economic, Social and Cultural Rights, including the Right to Development, Report Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum - State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions, A/HRC/11/13/Add.1, 15 May 2009
42. Governments that adhere to the Guidelines must establish a National Contact Point (NCP) to handle all matters relating to the Guidelines, including investigating complaints from NGOs and trade unions against companies who have failed to follow the Guidelines. NCPS can be based in a relevant government department or they can be independent structures comprising government officials, trade unions, employers unions and sometimes also NGOs. The OECD Guidelines were updated in 2011. Relevant documents, including a comparison between the 2000 and 2011 texts, can be found at http://www.oecd.org/corporate/mne/2011update.htm
43. State-based non-judicial mechanisms are grievance mechanisms initiated by the State with a mandate to handle grievances or to advise in adjudicative or mediation-based grievance procedures. Examples include National Contact Points in the 42 States adhering to the OECD or National Human Rights Institutions. Opijnen, Marjon van and Joris Oldenziel 2010: Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies for the case-study of the garment industry in Bangladesh.
44. United Nations (2011), Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04

Access to remedy can also be provided at the company level but is dependent on company goodwill and other contextual factors such as national policies and legislation[45]. In instances where workers' involvement mechanisms are established, success is dependent on building capacity of workers and getting them to be actively involved[46].Trade Unions are also important institutions for addressing rights violations but they can face the same difficulties.

Constraints on access to remedy depend on who can access such mechanisms - in terms of the legal barriers that certain groups may face (for example, migrant workers may be excluded from the same level of legal protection) and also in terms of the restrictions placed on which persons have the legal standing to seek remedy; at which level abuses take place (judicial mechanisms may not have the mandate to address extra-territorial violations that take place throughout a company's supply chain); how grievance mechanisms are designed (lack of awareness, trust and transparency, lack of proper representation, inefficient timeframes for redress, high costs, inadequate compensation and restitution, fear of reprisal are all factors that may hinder efficient access to remedy)[47]. Mechanisms may be specific in scope and in what type of complaints can be brought forward[48].

MULTI-STAKEHOLDER COLLABORATION

Grassroot activists and the media have put corporate practices under greater scrutiny so that companies risk reputation by not complying with fair practices. However, while 'name and shame' approach may have some advantages[49], increasingly dialogue and constructive engagement between all stakeholder groups is being followed and several human rights organisations have also entered into dialogue with businesses[50]. Many UN agencies have established their own multi-stakeholder partnerships to improve business practices in different sectors[51].

The UN Guiding Principles recognise the importance of multi-stakeholder cooperation (especially in providing access to remedy), and urge companies to engage in external consultations "with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives"[52]. A growing number of business groups support community-

45. This is especially true for the right to freedom of association and collective bargaining which are considered as 'enabling rights' but are not implemented in all countries. According to a UNHRC survey about 66% of all companies worldwide recognise both freedom of association and the right to collective bargaining. Outside Europe and the USA this is about 50%. For more details, please see Opijnen, Marjon van and Joris Oldenziel (2010), Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies.
46. For the example of workers' involvement, see the case-study of the Workers' Forum for factories producing for Reebok and Nike in India, mentioned in Opijnen, Marjon van and Joris Oldenziel (2010), Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies.
47. For more details, see United Nations (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HR/PUB/11/04
48. While the OECD Guidelines for Multinational Enterprises provide a grievance mechanism, it has narrowed scope in being limited to "investment-like" business relationships only and has limited interpretation (complaints on living wages and biodiversity can be excluded. See Opijnen, Marjon van and Joris Oldenziel (2010), Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies.
49. When LIFE Magazine published a feature on child workers producing footballs for Nike in Pakistan in the 1990s, the company's sales plummeted as a result of consumer boycotts. Thereafter, the company became the loudest advocate of fair working practices, contributing to the development and diffusion of fair labour standards. Lucci (2012), Post-2015 MDGs: What role for business? Overseas Development Institute
50. For example, see Amnesty International's Human Rights Principles for Companies www.amnesty.it/ailib/aipub/1998/ACT/A7000198.htm. Human Rights and Global Witness have developed country specific recommendations for oil companies operating in Nigeria and Angola.
51. For a comprehensive list, see http://www.business-humanrights.org. At the regional level, business networks such as CSR Europe (http://www.csreurope.org/home) and the ASEAN CSR Network (http://www.asean-csr-network.org/c/) engage with regional intergovernmental organisations and other regional actors as part of their efforts to improve CSR in their respective regions. The ASEAN CSR Network, which includes the ASEAN Foundation, framed a CSR Policy Statement for businesses in its participating countries to follow, http://www.asean-csr-network.org/c/news-a-resources/csr-policy-statement.
52. United Nations (2011), UN Guiding Principles on Business and Human Rights

oriented development initiatives both at the local and international level[53]. In developing countries where domestic and foreign companies have become influential actors in development[54] questions about the manner in which the private sector can best contribute to development in the post-2015 development agenda are being raised[55]. Private investors[56] and company shareholders[57] are also increasingly being recognised as actors who can influence change in the manner in which business is conducted.

National Human Rights Institutions (NHRIs) have an important role in reporting and monitoring human rights violations by non-state actors as well as providing guidance on human rights observance practices[58]. The Danish Institute for Human Rights has international renown for its Human Rights and Business Project which offers a number of services including a web-based self-assessment tool for companies on human rights compliance; business training courses for both companies and NHRIs, advice to improving codes and a human rights hotline providing advice to companies who may not have in-house human rights advisory services. Many NHRIs also exchange information with each other – for example, the South Korean and Philippine NHRIs have a verbal agreement to alert each other where an issue arises in relation to migrant workers. A similar agreement also exists between the Philippines and Malaysian NHRIs.

The 14th Informal ASEM Seminar on Human Rights will be looking at key aspects of business and human rights, especially with regards to the situation in ASEM member countries and regionally in Asia and Europe. The four working group topics are:

1. State Duty to Protect Human Rights Against Violations by Businesses
2. Corporate Responsibility and its Contribution to Human Rights Implementation
3. Monitoring, Reporting and Access to Remedies
4. Multi-stakeholder cooperation

Cross-Cutting Questions:

1. What are the limits to the responsibilities of corporations under international law and international criminal law? Are there regional differences about the role of businesses in society (eg, are there different understandings of the concept of corporate citizenship?)
2. At the international level, what can be done to make CSR and human rights protection a bigger consideration in trade agreements and practices? What is the role of organisations such as the WTO and ILO in this aspect?

53. For example, many ICT companies have been active in bridging the 'digital divide' - Hewlett Packard's E-Inclusion initiative, Netcore Solutions in India, Vodacom developing community access centres in southern Africa, Cisco's Netaid, Ericsson's 'First On the Ground initiative' and Microsoft's 'Refugee Registration Project' are notable models.
54. For example, the Netherlands National Committee for International Cooperation and Sustainable Development developed the MDG Scan, an assessment framework to measure the impact of private companies in developing countries, in contributing towards achieving progress of the MDGs.
55. Lucci (2012), Post-2015 MDGs: What role for business? Overseas Development Institute
56. The concept of Socially Responsible Investment explicitly recognises the "relevance to the investor of environmental, social and governance factors, and of the long-term health and stability of the market as a whole. It requires investors to pay attention to wider contextual factors including the expectations of the societies of which they are part.
See, UNPRI, "Principles of Responsible Investing", http://www.unpri.org/viewer/?file=wp-content/uploads/1.Whatisresponsibleinvestment.pdf
57. Shareholder resolutions have increasingly called on companies to include human rights due diligence into their operations. See http://www.csrwire.com/blog/posts/812-taking-action-to-respect-human-rights-shareholders-shift-from-policy-to-action or http://www.huffingtonpost.com/margaret-jungk/mcdonalds-shareholders-no_b_3317423.html for examples.
58. The 2008 OHCHR publication Business and Human Rights: A Survey of NHRI Practices provides information on the mandate and capacities of NHRIs to manage corporate-related grievances and issues. Measures that NHRIs can undertake include conducting public inquiries and fact-finding missions; investigating individual complaints; dispute resolution, enforcement of outcomes; ongoing compliance monitoring, dissemination of findings, advocacy, developing educational tools for the community and to TNCs, governments and other stakeholders in particular. For more details see http://www.reports-and-materials.org/OHCHR-National-Human-Rights-Institutions-practices-Apr-2008.doc

3. How can policy coherence on business practice and human rights protection be enhanced at the national and international level? What role and support can regional mechanisms and institutions provide in policy coherence?

4. Apart from reputational damage, what is the actual risk to companies for poor practice in respect to human rights standards?

5. What are the different approaches required for different industries and business sectors (eg, extractive industries, textiles, media, service providers, financial institutions etc) when it comes to human rights protection (in the context of each of the 4 working group topics)?

6. What considerations need to be kept in mind for vulnerable groups such as women, LGBT, children and indigenous communities as well as ethnic and religious minorities?

7. Which organisations/institutions have the legitimacy to decide on business standards?

WG1: State Duty to Protect Human Rights Against Violations by Businesses

1. What measures, both preventive and remedial, can States take to redress human rights abuses by businesses, especially transnational corporations? (successful case-studies, best practices of state protection) At what level? What are the challenges faced by States in this regard? (legal, information, knowledge-sharing, lobby groups etc)

2. What is the State's responsibility in ensuring observance of human rights by its transnational companies (TNCs) in another country, especially if the other country is not party to certain international treaties (or if it doesn't regulate against that particular human rights violation)? What efforts can it undertake to prevent human rights violations by its TNCs?

3. When there is no region-wide enforcement or regulation of company fair practices, how can States improve human rights protection from corporate violation at the regional level?

4. What strategies can be utilised to ensure that States are able to adhere and follow the international labour standards to which they have subscribed?

5. What kind of cooperation is needed between States to ensure that economic production does not infringe upon the human rights of populations in host and home countries? How can States best utilise existing fora such as such the Universal Periodic Review to learn and apply in their own domestic protection duties?

6. What kind of support (both legal and non-legal) could States provide to companies to encourage responsible supply chain management?

7. Due to the nature of Special Economic Zones (SEZs) and their exemption from some federal laws, how do governments improve human rights observance while still maintaining SEZs' purpose and effectiveness?

8. When contracting out State functions, how can States ensure that private firms will respect human rights? What (internationally accepted) training/certification do private contractors need to undergo? What is the collaboration required between states and private security companies at the local, regional and international levels?

WG 2: Corporate Responsibility and its Contribution to Human Rights Implementation

1. How do businesses interpret their human rights obligations, especially on issues where there is no international consensus (for example, while there are standards on minimum wages, there are no standards for living wages[59] so how do companies determine what constitutes living

59. Only in 26% of the countries in the world, the minimum wage can be said to be a living wage. The position in Europe is better, in 40% of Europe's countries provides the minimum wage for an adequate standard of living. Opijnen, Marjon van and Joris Oldenziel 2010: Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies for the case-study of the garment industry in Bangladesh.

wages?)? When operating in countries where standard differ from their own home countries, which standards do companies follow?

2. While larger multinational companies often have the resources to include human rights into their company policies, how do SMEs, who often lack financial resources and access to financial assistance, incorporate human rights concerns into their business operations?

3. When local legal standards do not guarantee a minimum of rights, how can companies, especially SMEs, be encouraged and supported to uphold their responsibilities?

4. How can human rights impact be included more frequently/made compulsory in other risk assessment exercises that companies undertake? What should such risk assessments include and how would they measure human rights impact?

5. What support can private businesses receive (from national, regional and international institutions) in understanding and implementing their human rights obligations?

6. With many companies contracting work out to informal supply chains, how can companies monitor rights infringement by subsidiaries – especially in the informal work sector?

7. With whom – and to what extent - does the scope of responsibility lie, in relation to suppliers' practices in the supply chain, given the influence that buyers can have on suppliers?

8. How can social audits of supply chain conditions be improved to address all aspects of labour conditions and not just specific working conditions in production facilities?

9. What have been successful methods for businesses to commit to human rights standards (self-regulation, collaborative initiatives or sectoral initiatives, codes of conduct, reporting obligations, legal undertakings etc)?

10. How can companies translate global human rights principles into internal operating policies? Are they expected to pay attention to certain principles in particular?

WG3: Monitoring, Reporting and Access to Remedies

1. What does 'accountability' mean in the context of non-judicial grievance mechanisms? What role do NHRIs/ombudsmen play in enforcing or monitoring non-judicial mechanisms?

2. What efforts can be undertaken to reduce the legal barriers to access remedy? (eg, In addition to being a vulnerable group, working children may be under-aged and require consent/ representation)

3. For company level grievance mechanisms, what scope is there for independent investigation and adjudication, in the context of possible bias? How do States encourage private companies to establish fair grievance mechanisms?

4. What are the different monitoring mechanisms required in those countries where parent companies are based and in those countries where supply chain manufacturing occurs? How can

   the challenge of providing effective grievance mechanisms for extraterritorial abusive activities of companies be addressed?

5. What role does 'access to information' play in 'access to remedy'? How is this translated into practice (especially since in some countries, access to information laws may be limited to public sector enterprises only)?

6. What collaborative multi-stakeholder initiatives exist to provide access to remedy? What are their advantages as compared to state-based or company-provided remedies?

7. For the informal sector, how do States and parent companies monitor violations? How do workers in the informal sector seek grievance redressal? How do they receive information?

8. Rights abuses can take place throughout the supply chain but it has proven difficult to establish grievance mechanisms at each level. How can these obstacles be overcome?

WG4: Multi-stakeholder cooperation

1. In designing different multi-stakeholder initiatives (such as the Global Compact), which stakeholder has the ultimate authority and responsibility in developing and implementing such guidelines?

2. As States retain their international human rights obligations when they participate in multilateral institutions such as international trade and financial institutions, what support can/do international and multilateral institutions provide to helping them discharge their duties effectively?

3. What are the human rights obligations of International Financial Institutions (IFIs)? Do they merely have to respect human rights and make sure that their activities do not have harmful effects on the enjoyment of rights or do their obligations also entail a duty to protect and even fulfil human rights in certain circumstances? What support can they provide for socially responsible investment?

4. What efforts can be made at the regional and national level to encourage and support businesses to incorporate due diligence components as mentioned in the UN framework, into their operating practices?

5. When it comes to workers' rights, how do the different stakeholders (companies, the ILO and trade unions) engage in an effective social dialogue? How can the capacity of workers be improved so as to take equal ownership of such a dialogue?

6. What is the role of the Unions – national and international? If unions are not legally accepted (or not independent) in the country how can workers organise and "claim" their rights?

7. How can shareholders and consumers improve their influence on businesses to incorporate human rights into their operations? How can companies engage in a collaborative civil dialogue with these stakeholders?

8. To improve their capacity to work with private corporations and business enterprises, what training do NHRIs and Civil Society Organisations (CSOs), especially grassroots organisations, require?

9. At the regional level, what level of cooperation can be extended between NHRI networks to provide information, alerts and guidance on human rights and business? What role do regional organisations such as the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the European Court of Human Rights (ECHR) play in improving capacity of member NHRIs? In improving monitoring of business observance of human rights?

10. In what capacity can local chambers of commerce and other national business associations (such as manufacturers' or exporters' associations) encourage members to be responsible for human rights protection – what support can they offer?

ANNEX 4: SELECTED BIBLIOGRAPHY

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ANNEX 5: ABOUT THE CO-ORGANISERS

The **Asia-Europe Foundation (ASEF)** promotes understanding, strengthens relationships and facilitates cooperation among the people, institutions and organisations of Asia and Europe. ASEF enhances dialogue, enables exchanges and encourages collaboration across the thematic areas of culture, economy, education, governance, public health and sustainable development.

ASEF is a not-for-profit intergovernmental organisation located in Singapore. Founded in 1997, it is the only institution of the Asia-Europe Meeting (ASEM).

Together with about 750 partner organisations ASEF has run more than 700 projects, mainly conferences, seminars and workshops. Over 20,000 Asians and Europeans have actively participated in its activities and it has reached much wider audiences through its networks, web-portals, publications, exhibitions and lectures.

For more information, please visit www.asef.org

The **Raoul Wallenberg Institute** of Human Rights and Humanitarian Law is an independent academic institution dedicated to the promotion of human rights through research, training and education. Established in 1984 at the Faculty of Law at Lund University, Sweden, the institute is currently involved in organising in Lund two Masters Programs and an interdisciplinary human rights programme at the undergraduate level. Host of one of the largest human rights libraries in the Nordic countries and engaged in various research and publication activities, the Raoul Wallenberg Institute provides researchers and students with a conducive study environment. The Institute maintains extensive relationships with academic human rights institutions worldwide.

For more information, please visit www.rwi.lu.se

The French Ministry of Foreign Affairs and International Development, as a founding member of ASEM, is pleased to have supported the ASEM human rights dialogue since its inception in 1997.

For more information, please visit www.diplomatie.gouv.fr/en/

The **Philippine Department of Foreign Affairs** is the prime agency of the Philippine government responsible for the pursuit of the State's foreign policy. It is also responsible for the coordination and execution of the foreign policies of the country and the conduct of its foreign relations.

For more information, please visit www.dfa.gov.ph

ANNEX 6: ABOUT THE HOST

BỘ NGOẠI GIAO
MOFA

The Ministry of Foreign Affairs of Viet Nam is a governmental agency, performing the function of state management of external affairs, including diplomatic work, national border and territory, the community of overseas Vietnamese, the conclusion and implementation of international treaties and agreements, management of overseas representative offices of the Socialist Republic of Vietnam and operation of foreign representative offices in Vietnam; the state management of public services in domains within the scope of its state management in accordance with law.

Asia-Europe Meeting

18-20 November 2014
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The aim of the Informal ASEM Seminar on Human Rights is to promote mutual understanding and co-operation between Europe and Asia in the area of political dialogue, particularly on human rights issues.

Previous seminar topics include:

- *Access to Justice; Regional and National Particularities in the Administration of Justice; Monitoring the Administration of Justice* (1997, Sweden)
- *Differences in Asian and European Values; Rights to Education; Rights of Minorities* (1999, China)
- *Freedom of Expression and Right to Information; Humanitarian Intervention and the Sovereignty of States; Is there a Right to a Healthy Environment*? (2000, France)
- *Freedom of Conscience and Religion; Democratisation, Conflict Resolution and Human Rights; Rights and Obligations in the Promotion of Social Welfare* (2001, Indonesia)
- *Economic Relations; Rights of Multinational Companies and Foreign Direct Investments* (2003, Sweden)
- *International Migrations; Protection of Migrants, Migration Control and Management* (2004, China)
- *Human Rights and Ethnic, Linguistic and Religious Minorities (2006,* Hungary)
- *Human Rights and Freedom of Expression* (2007, Cambodia)
- *Human Rights in Criminal Justice Systems* (2009, France)
- *Human Rights and Gender Equality* (2010, Philippines)
- *National and Regional Human Rights Mechanisms* (2011, Czech Republic)
- *Human Rights and Information and Communication Technologies* (2012, Korea)
- *Human Rights and the Envronment* (2013, Denmark)
- *Human Rights and Businesses* (2014, Viet Nam)

The Seminar series is co-organised by the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute (delegated by the Swedish Ministry of Foreign Affairs), the French Ministry of Foreign Affairs and International Development and the Department of Foreign Affairs of the Philippines. ASEF has been the secretariat of the Seminar since 2000.

Supervision of the seminar is entrusted to a Steering Committee, composed of the Seminar's four co-organisers as well as representatives of the Ministries of Foreign Affairs of China and Indonesia as well as the European Union.

The Informal ASEM Seminar on Human Rights Series is a partnership between:

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